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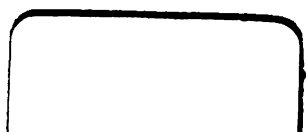
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JS,
JA,
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V.1

REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER,
At Law and in Equity,
AND IN THE
EXCHEQUER CHAMBER,
In Equity and in Error;
FROM
TRINITY TERM, 3 GEO. IV.
TO THE
SITTINGS AFTER HILARY TERM, 4 GEO. IV.
BOTH INCLUSIVE.
VOL. XI.

By GEORGE PRICE, Esq.
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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JUL 15 1901

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The Cases which are distinguished by this mark † were decided in the Exchequer Chamber in Error from the King's Bench.

Those which were determined upon appeal in the House of Lords have the capitals [D. P.] after the name of each Case.

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1. The first part of the paper is devoted to a general discussion of the problem of the existence of a solution of the system of equations (1) for arbitrary values of the parameters α and β . It is shown that the system of equations (1) has a solution for arbitrary values of the parameters α and β if and only if the condition

$$\alpha + \beta = 1$$

is satisfied. In the case when this condition is not satisfied, the system of equations (1) has no solution.

2. The second part of the paper is devoted to a detailed analysis of the properties of the solution of the system of equations (1) for arbitrary values of the parameters α and β . It is shown that the solution of the system of equations (1) is unique and that it is continuous with respect to the parameters α and β .

3. The third part of the paper is devoted to a numerical analysis of the solution of the system of equations (1) for arbitrary values of the parameters α and β . It is shown that the solution of the system of equations (1) can be approximated by a finite difference method with an error of order $O(h^2)$.

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The Reader is requested to correct the following

ERRATA.

Page 614, lines 12 and 16 from top: *dele* "was given for the Plaintiff" in l. 12, and "judgment" in l. 16; and transpose "was given for the Defendant" from the latter to the former line.

Page 642, line 2 from bottom, for "form" read "forms."

J U D G E S
OF THE
COURT OF EXCHEQUER,

During the Period of the Reports contained in this Volume.

Right Honourable Sir R. RICHARDS, knt.

Sir R. GRAHAM, knt.

Sir GEORGE WOOD, knt.

Sir W. GARROW, knt.

Sir JOHN HULLOCK, knt.

REPORTS
 OF
CASES
 ARGUED AND DETERMINED
 IN THE
COURT OF EXCHEQUER
 AND
EXCHEQUER CHAMBER.

 TRINITY TERM,
 3 GEO. IV.

AUSTEN v. THOMSON.

JERVIS and *Temple*, who shewed cause against the common order *nisi* obtained by the Defendant for dissolving the Injunction which had been granted in this case, to restrain the Defendant from proceeding to take out execution in the action at law brought by him against the Plaintiff, in which he had recovered a verdict at the last Assizes, had procured the order to be discharged: and the Injunction was continued, on the terms of paying into Court the amount recovered at Law within a month.

It was urged on the part of the Defendant, that, the Court of King's Bench having, since the trial

1822.

Friday,
7th June.

The rule of practice,—that a party against whom a verdict at law has been obtained must pay the sum recovered into Court before he can entitle himself to an injunction to stay execution,—prevails, notwithstanding a rule have since been obtained by him requiring the Plaintiff to shew cause why there should not be a new trial.

1822.
 AUSTEN
 v.
 THOMSON.

of the cause, granted a rule to shew cause why the verdict should not be set aside, and a new trial had,—the present case was not, therefore, within the principle of the general rule, that after a verdict has been obtained, the failing party must pay into Court the sum recovered before an Injunction can be granted; for as the verdict was as yet *sub judice*, execution could not be sued out in the ordinary course, until the rule were ultimately disposed of, even if it should be discharged.

Roupell and *Merrivale*, for the Plaintiff, submitted that the object of the rule of practice, in respect of paying the money into Court in such cases, being the security of the party, it applied to the present case: and that the circumstance of there having been an order made to shew cause why there should not be a new trial, furnished no reason for making such a case an exception to the rule.

No authority was cited on either side. The Court determined that the circumstance of an order for a new trial having been obtained, did not operate as an exception to the rule of practice in this respect. They therefore

Continued the Injunction,—on the terms of paying the money recovered by the verdict into Court, within a month.

MAXWELL

MAXWELL and others v. WARD.

1822.

Saturday,
8th June.(Construction
of
Covenant.)

Quare,—where there is a covenant in a lease for ninety-nine years, if three persons therein named, should so long live, that if the lessee, his executors, &c., should, at any time thereafter, upon the death of any, or either of the life or lives by which, &c., be desirous to renew, by adding a life or lives, in the room of the person or persons so dying, and should give notice, in writing, within one year next after the death of any, or either of the said person or persons, for whose life or lives the premises were

THIS suit was instituted by the representative and trustees of the person last beneficially interested in a lease of property which had been demised for ninety-nine years, determinable on lives, with a covenant for renewal, against the lessor, to compel performance of that covenant, all the *cestuis que vie* being dead; which had been refused, on the ground that the application should have been made on the expiration of the first life.

The bill prayed that it might be declared by the Court that the Plaintiffs were entitled to a *perpetual renewal of the lease* therein mentioned, by the insertion, in the indenture of lease prayed to be executed and in all future indentures, of a covenant, in the same, or the like words with the covenant, for such purpose, and to such effect, as in the indenture of lease in the bill set forth; and from time to time and so often as any persons or person named as lives or a life in such indentures should happen

then held, the lessor would, within one year next after the death of any such life or lives, execute a new lease—whether, in order to enforce the performance of such a covenant in Equity, it is not necessary that the party claiming to be entitled to the benefit of the renewal, should not be able to shew that a claim was duly made within twelve months after the death of the *cestui que vie*, who died first; although there were no express provision in the lease that the lessee should then give notice, or be precluded:—or whether the covenant may not be enforced after a claim of renewal, made within twelve months after the expiration of the second life, where the party beneficially entitled to the right of renewal stated, in his bill to compel performance of the covenant, the temporary loss of the lease, and his consequent ignorance of the covenant, as the reason why application was not made within twelve months after the dropping of the first life.

Held to be a question of so much doubt, at least, as to be good cause for not dissolving an Injunction obtained to restrain parties proceeding in Ejectment—doubt, in matters of Law, being sufficient ground in Equity for continuing an Injunction once granted.

Judges in Courts of Equity are not bound by the opinion of Courts of Law to which cases are sent for their opinion and judgement.

1822.

MAXWELL
and others
v.
WARD.

happen to die, to have renewals or a renewal, in respect of such expired lives or life, by the substitution of other lives or another life, in the place of such expired lives or life.

It also prayed—that the Defendant might be decreed to execute to the Plaintiffs, *Frances Maxwell*, *Charles Seymer Birch*, and *Charles Pilkington*, a new or renewed lease, of the hereditaments and premises comprised and described in the therein mentioned indenture of lease of the 25th of *March* 1792, according, and agreeably to the true intent and meaning of the covenant for that purpose therein contained, for the term of ninety-nine years from the death of *Edward Phineas Maxwell*, determinable with the lives of *H. Gilpin*, *George Maxwell*, and *T. W. Birch*, and the life of the survivor of them, subject to such rents, covenants, and provisoes, as therein set forth: or, if the Court should be of opinion, under the circumstances, that the Plaintiffs, *Frances Maxwell*, *Charles Seymer Birch*, and *Charles Pilkington*, were not entitled to have such renewed lease executed to them, with three lives named therein, that the Defendant might be decreed to execute to Plaintiffs a good and effectual lease of the hereditaments and premises comprised and described in the said indenture, for the term of ninety-nine years from the death of *Edward Phineas Maxwell*, determinable with the lives of the said *George Maxwell* and *T. W. Birch*, and the life of the survivor of them, subject to such rents, covenants, and provisoes, as in the indenture of the 25th of *March* 1792, were particularly mentioned and set forth; the Plain-

tiffs

tiffs being ready and willing, and thereby offering, in every respect, to fulfil the provisoes, conditions, covenants, and agreements, in the said indenture contained, on the part of the lessee, his representatives and assigns: and that, in the mean time, and until such lease should be executed, the Defendant might be restrained by the Court from prosecuting his action of ejectment commenced, &c.

1822.

 MAXWELL
 and others
 v.
 WARD.

The bill stated that the Defendant, being seised in fee of the premises therein described, by lease of the 25th of *March* 1792, executed between the Defendant, of the one part, and *E. M. Brown*, since deceased, of the other part, demised the premises to the said *E. M. Brown*, for the term of ninety-nine years, if he (*Brown*) and *Edward Candler* and *Edward Phineas Maxwell* should so long live, at the yearly rent of 2*l.* 5*s.*, subject, amongst other clauses, provisoes, and agreements, to a proviso or condition, that, “if *Edward Maxwell Brown*, his executors, administrators or assigns, should, at any time thereafter, upon the death of any, or either of the life or lives by which the said demised premises were then held, be desirous to renew his estate and interest, by adding a new life or lives in the room of the person or persons so dying, and should give notice, in writing, to or for the Defendant, his heirs and assigns, within one year next after the death of any or either of the said person or persons, for whose life or lives the said premises were then held, then and in such case, the Defendant, his heirs and assigns, should and would, at the costs and charges of the

“ said

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MAXWELL
and others
v.
WARD.

“ said *E. M. Brown*, his executors, administrators,
 “ or assigns, at any time within the space of one
 “ year next *after the death of any such life* OR LIVES,
 “ execute to the said *E. M. Brown*, his executors,
 “ &c., a good and sufficient, and effectual lease of
 “ the premises, for a new term of ninety-nine years,
 “ to be determinable on the death or deaths of such
 “ of the said life or lives thereinbefore mentioned,
 “ as should be then living, and the life or lives of
 “ such other person or persons as the said *Edward*
 “ *Maxwell Brown*, his executors, administrators, or
 “ assigns, should nominate, in the room of the life
 “ or lives so dying, under the like yearly rents,
 “ covenants, provisoes, conditions, and agree-
 “ ments,” to all intents and purposes, *mutatis mu-*
tandis, as were in the same indenture contained;
 and so *toties quoties* any life or lives should drop,
 and *E. M. Brown*, his executors, &c., should
 be desirous to renew his, or their interest therein;
 whereupon *E. M. Brown*, his executors &c., were
 to pay to the Defendant, his heirs and assigns, the
 sum of 4*l.* 10*s.* for each life so to be added, besides
 the charges of such new lease: and finally, *Brown*
 was to execute to the Defendant, his heirs and as-
 signs, a counterpart of every such new lease, and
 deliver up the former to be cancelled.

The bill then stated that *E. M. Brown* died in
 the month of *February* 1803, having, by his will,
 dated the 21st *April* 1795, given all his leasehold
 hereditaments whatsoever, unto *E. P. Maxwell*, his
 executors, &c.; and he appointed *E. P. Maxwell*,
 with *James Adair* who died in the life-time of the
 testator,

testator, joint executors of his will—that *E. P. Maxwell* proved the will, and became as the sole legal personal representative of *E. M. Brown* beneficially entitled to the said lease.

1822.

MAXWELL
and others
v.
WARD.

E. P. Maxwell died on the 20th of *February* 1818, having, by his will of the 22d day of *April* 1807, appointed his wife, the Plaintiff, *Frances Maxwell*, and the Plaintiff *William Gilpin*, and another person (*James Fisher*, since deceased), his executrix and executors, and thereby, after bequeathing certain pecuniary legacies, he bequeathed all the residue of his personal estate, which included these leasehold premises to his executors, and the survivor of them, upon certain trusts. The Plaintiffs *Birch* and *Pilkington* were appointed trustees in the places of *Fisher* and *Gilpin*, under a power for that purpose in the will.

It was stated also in the bill (by amendment) that, after the death of *E. P. Maxwell*, and until the year 1808, the said indenture of lease was lost or overlooked—that, early in the year 1808, the said indenture of lease was, amongst other papers, sent for custody by *Edward Phineas Maxwell*, to his Solicitor, at which time, he (*Maxwell*) was, and till then always had been, ignorant of the fact that *Edward Maxwell Brown* was one of the lives named in the said indenture, and of the right, and conditions of renewal therein contained; but that he was then apprised of it by his Solicitor, who soon afterwards, by his direction, applied to the Defendant, and requested that such renewal might be made,

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made, by the substitution of a new life in the place of *Edward Maxwell Brown*; whereupon a correspondence took place between the Solicitors of both parties, in which the circumstance, and the cause of delay, in making the application for renewal, were stated and explained, and offers were made, on behalf of *Edward Phineas Maxwell*, to fulfil all the conditions of such renewal; but that, after much delay on his part, the Defendant, by his Solicitor, in the year 1810, refused to make such renewal. The bill further stated that *E. P. Maxwell*, having been advised that it was doubtful whether he could enforce such renewal without having required the same within twelve months from the death of *Edward Maxwell Brown*, but that he would have the right of renewal as to the two remaining lives, did not think it expedient, until one of such remaining lives should drop, to raise any question, by suit at Law or in Equity, as to his right of renewal in respect of the expired life: that, in *August* 1817, one of the two then surviving lives expired; and, in *February* 1818, before any renewed lease of the premises was granted, *Edward Phineas Maxwell*, the then last surviving life, also died: and the Plaintiffs charged that, upon his decease, *Gilpin* and *Frances Maxwell* became entitled, as his representatives, to have the lease renewed, upon the terms and conditions contained in the indenture. And they stated that, accordingly, *on or about the 6th of April* 1818, they caused a notice, in writing, to be delivered to the Defendant, reciting all the facts, and thereby proposed *Henry Gilpin*, then of the age of

of fourteen years, as *cestui que vie* in such renewed lease, in the room of *Edward Maxwell Brown* deceased; and they also proposed *George Maxwell*, described therein, as *cestui que vie*, in the room of *Edward Candler Brown*, deceased; and, lastly, *Thomas Wickham Birch*, therein described, in the room of *Edward Phineas Maxwell*; and required the Defendant to grant them forthwith a new lease of the premises, and thereby offered and undertook to [perform all necessary conditions,] &c.

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The answer admitted the material facts, or did not deny any of them,—submitting to the Court that, on the death of *E. P. Maxwell*, the lease was determined.

The Defendant admitted in his answer, that *E. P. Maxwell* was, as executor of *E. M. Brown*, entitled upon *Brown's* death, to the lease, and the benefit of the covenants therein, and to that for the renewal; and that he would have been entitled to renew by adding a life, if he had conformed with the terms of the covenant; but the Defendant alleged that *Maxwell* did not make any application to him for such renewal *until the year 1808*, when he submitted that the benefit of the covenant for renewal *had become forfeited*, no application having been made within one year after the death of *Brown*.

The answer also stated, that in *March 1808*, application for a renewal was made on the part of *E. P. Maxwell*, by adding a new life in the place of *Brown*,

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Brown, who died in 1803, and that the defendant refused to comply, for the reason before stated; and that upon the occasion of such application, the loss or mislaying of the lease was mentioned to him, and the ignorance of *E. P. Maxwell* as to the terms of the covenant; but the truth of that the Defendant did not admit, putting the Plaintiffs to proof, if such circumstance should be considered material.

It concluded by submitting to the judgement of the Court, whether the Defendant had, under the circumstances, had due notice, or whether the applications for renewal were such as satisfied the terms of the covenant.

An injunction having been granted, and the common order *nisi* for dissolving it having been obtained on the coming in of the Defendant's answer,

Jervis and *Palmer* now shewed cause on the merits. They contended, that under the circumstances of this case, the plaintiffs had lost their right of renewal by their own laches, in not having conformed with the condition of the proviso, as they had not given notice in writing of their desire to renew their interest, by adding a new life, within twelve months after the expiration of the first life.

They submitted this was a mere question on the legal construction of the terms of the covenant, and one which had already been settled by various determinations. In the case of *Rubery v. Jervoise* (a),

(a) 1 Term Rep. 229.

it

it was decided that a covenant on the part of the lessor, in a lease for sixty-one years, to execute on request, &c., another lease, in consideration of 6*l.*, for the further term of twenty years, to commence after the expiration of the term of sixty-one years; and in like manner at the end and expiration of every twenty years during the said term of sixty-one years, to commence at and from the expiration of the term then last before granted, could not be enforced if the lessee had neglected to apply at the end of the first and each successive term of twenty years. In *Bayley v. the Corporation of Leominster* (b), a covenant in a lease for three lives, to renew as often as either of the three lives should die, was held not to furnish any equity to claim a renewal where two of the lives had been suffered to fall, although compensation was offered. They adverted to the authority of the decision in the case of *Baynham v. Guy's Hospital* (c), as one singularly applicable to the present, and not distinguishable, where it was held, that under a lease for ninety-nine years, determinable on three lives, renewable on the death of the first, or "any or either of the "life or lives" during which the premises were to be held, the lessee, to entitle himself to the benefit of the covenant, must apply when the first life dropped. So in *Eaton v. Lyon* (d), which was decided expressly on the authority of the case of *Bayley v. the Corporation of Leominster*, it was said by the Master of the Rolls, in giving judgement (e),

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(b) 3 Bro. Ch. c. 529.

(c) 3 Ves. 295.

(d) 3 Ves. 690.

(e) P. 695.

that

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that these covenants must be literally performed where they can, and *Equity* will interpose and go beyond the stipulations of the covenant *at Law*, only where a literal performance has been prevented by fraud, surprise, or ignorance not wilful. The first part of the judgement in that case was also referred to for the expression that “the construction of covenants is the same in equity as at law:” and they relied much on that decision, as furnishing an answer to any argument which might be founded on the language of this covenant, “any or “either of the life or lives” &c. being plural and applying, therefore, to a *second* life dropping before application made for renewal.

They also cited the following cases to shew that Courts of Equity will not relieve from forfeiture for, generally breach of covenant, by injunction to restrain proceedings at law;—*Bracebridge v. Buckley* (*f*), *Rolfe v. Harris* (*g*), *Reynolds v. Pitt* (*h*), and *White v. Warner* (*i*).

On the facts of the case, and the principles deducible from the authorities, they contended that the plaintiffs were not entitled to the relief prayed by the bill.

Martin and *Bligh* for the Plaintiffs, in support of the order for dissolving the injunction, submitted that they were entitled in Equity to the relief

(*f*) 2 Price Exch. Rep. 200.

(*g*) *Ib.* 206 (*in notis*).

(*h*) 2 Price Exch. Rep. 212 (*in notis*). (*i*) 2 Merriv. 459.

sought

sought by the bill, on the general principles recognized by the decisions, and now established by the authority of the cases; and that they were not precluded by laches in not having made an earlier application for a renewal of the lease, or the substitution of a new life within twelve months after the expiration of the first life, under the circumstances of this case.

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[The *Lord Chief Baron* called the attention of the Counsel for the Plaintiff to the *nature* of the covenant; observing, that the Courts had strongly inclined to discourage covenants for perpetual renewal, and had in many instances set their faces against them, expressing considerable doubt whether they could be enforced.]

They urged that it was a general principle of Equity for Courts to relieve in all cases of forfeiture where no injury was done to the party, or fair compensation could be made, and was capable of being ascertained; *Seton v. Slade* (*k*): and they cited the authority of Lord *Redesdale* in the case of *Lennon v. Napper* (*l*), as recognizing the principle (in a suit for compelling a renewal of a lease for lives; notwithstanding an objection of laches, as made in the present case) that relief will be given against the effect of mere lapse of time, where time is not essential to the substance of the contract. It is there observed, that the object of these contracts on the part of the landlord, is nothing more than to

(*k*) 7 Vca. 265.

(*l*) 2 Scho. & Lefr. 682.

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secure the continuance of the tenure and the payment of the rent. The remarks of Lord *Redesdale* on the judgement of Lord *Mansfield* in the case of *Kane v. Hamilton* (m), attributing the doctrine ascribed to Lord *Mansfield*, in the report of that judgement, to mistake; and the distinction—taken in the same case between the principle of the determination of Lord *Thurlow* in *Murray v. Bateman* (n), and that of the principal case—that Lord *Thurlow's* decision proceeded on the ground of gross fraud on the part of the tenant, and not on the lapse of time, were much pressed on the Court.

[The Counsel for the Plaintiffs were then about to comment on the effect of the fact alleged in the bill, that the lease had been lost: but

In supporting a motion to dissolve an injunction, the Plaintiff cannot use any allegations in the bill unless confessed in the Defendant's answer.

The Court stopped them on that part of the case; reminding them, that on this proceeding it was not competent to them to state any thing from the bill, however well supported it might be on the hearing by the evidence, if it were not admitted by the answer, as the whole force of the case to be made for dissolving the injunction must be drawn from the answer alone.]


They then referred to the case of *Jackson v. Saunders* (o), for the purpose of shewing that the decision of Lord *Redesdale* turned on the circumstance of the tenant having been guilty of continued neglect, in suffering *two* lives to drop without mak-

(m) 2 Ridgw. Pl. 180 (*in notis*). (o) 1 Sch. and Lefr. 457.

(n) *Ib.* 187.

ing

ing any attempt to obtain a renewal, *with intent to deceive* his landlord. Still in that case it was held that the time within which the claim of such renewals ought to be made must always be determined by the circumstances of each particular case.

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They distinguished this case from that of *Baynham v. Guy's Hospital*, which was much relied on by the Counsel for the Defendant, by the fact of there having been introduced into the covenant in that case, *an express provision*, that if upon or after the death of any of the life or lives therein mentioned, the tenant should refuse or neglect to renew the lease, or to apply to do so for more than two years, or to tender a new lease, and pay the fine for such new life, the lease was to be void. So in *Bayley v. The Corporation of Leominster*, there was a stipulation in terms that the renewal was to be applied for as often as *either* of the three lives should die, and there should be only *two* lives remaining. In the present case they urged there were no words importing that a forfeiture was contemplated; and therefore it ought not to be insisted on: nor was there any thing implying that the application for a renewal must necessarily be made on the expiration of the first life.

On the question of laches, they relied much on the fact admitted by the answer, that the first application was made in 1808.

[The *Lord Chief Baron* observed, that this Court might have been applied to at that time.]

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Jervis, in reply, relied on the cases already cited as decisive against the Plaintiffs in this suit, and submitted that they were not, taken together, distinguishable.

He also objected the absence of any offer of compensation; but

The *Chief Baron* observed, that however that might be at law, the prayer of this bill was quite sufficient in that respect.

With respect to the first application in 1808, he insisted that in any event, whether the delay was accounted for or not, that was out of the question, as there had confessedly been no notice *in writing* given on that occasion, of an intention to renew.


Equity will relieve against an objection taken that notice of an intention to renew was not given, according to the letter of the condition of the covenant, *in writing*.

[The *Lord Chief Baron*.—As to that part of the case, if an application had been made to the Court at that time, the Court would most certainly have relieved the Plaintiff from the effect of the objection of notice *in writing* not having been given, if it could be shewn that a fair intimation of an intention to renew had been given in any way.]

The judgement of the Master of the Rolls, in the case of *Eaton v. Lyon*, was then very particularly pressed upon the Court, as establishing principles quite conclusive of this question.

RICHARDS, *Lord Chief Baron*.—The propositions are laid down somewhat more strongly in that judgement

ment than I think the cases warrant. I do not consider that it is necessary, in all cases of this sort, that there should be fraud, surprise or ignorance not wilful shewn, to entitle a party to relief. Those are common grounds of equitable relief in all cases of any description. This sort of relief is given constantly without any such causes existing, particularly in contracts for the sale of estates. Lord *Redesdale* has put the doctrine on grounds* much more satisfactory to me.

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In this instance there is quite a sufficient case made for continuing the injunction till the hearing, on the doubt which hangs over the questions in this cause, both as to the true construction and effect of the covenant, and the principles of administering relief, in cases of this nature, by Courts of Equity. Doubt, in such questions, is always a sufficient ground for continuing an injunction to prevent a change of possession of property, till the doubt be satisfactorily removed. That there is very great doubt in the present case, is sufficiently manifest from the argument to which it has given rise. The injunction must therefore be continued till the hearing of the cause. Then the whole case, with all the facts, may be brought fairly and fully before the Court; and, as it is certainly a very important question, the parties will have an opportunity of carrying it before the highest authority, by appeal.

I am desirous of making an observation on what

* In *Lennon v. Napper*, 2 Scho. and Lefr. 634-5.

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I see fell from Lord *Thurlow*, as stated by the Master of the Rolls, in the case of *Baynham v. Guy's Hospital*. Lord *Thurlow* is there said to have held, that when he asked the opinion of a Court of Law, he was bound by it, whatever his own might be. Now, certainly that is not in the present day considered to be the effect of the opinion of Courts of Law on cases sent for their judgment. The present Chancellor clearly does not consider himself bound by the certificate of the Judges of a Court of Law. In a very recent case,* in which Lord *Eldon* called in Mr. Justice *Abbott* and myself, we reviewed the opinion of the Court of Common Pleas; and the result was that we overruled it.

Order discharged.

Injunction continued till the hearing.

* The case alluded to here by his Lordship, is that of *Prebble and others v. Boghurst and others*, reported in 7 Taunt. 538., and 1 Swanston, 309. 580.

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8th June.

THE Plaintiff declared, in assumpsit, on the following written agreement, which was given in evidence; the parts of which that are between brackets only were set out in the declaration:—"Substance of an agreement on the part of *John Frederick Smith* and *George Ward*. The aforesaid *J. F. Smith* agrees to let [part of his house, consisting of the first and second floor, with the use of the small shop window, and large attic, and the large kitchen, at the sum of 75 guineas *per annum*]: *fixtures as follows* (enumerating them): "the rent to commence at the time possession is "taken." Signed by the defendant.

It is not an objection to a declaration, in an action of assumpsit for not giving the Plaintiff possession of certain apartments in the Defendant's house, agreed to be let by him to the Plaintiff, in consideration of rent, by a written agreement, in which the fixtures in the rooms were specifically enumerated, that it does not state the agreement to have been, as it was in fact, an agreement for letting the apartments and fixtures. Held, that the omission of the fixtures in declaring in assumpsit on the agreement, was clearly no variance.

The declaration contained three counts. The first stated, that the Defendant had, by a certain agreement,

the omission of the fixtures in declaring in assumpsit on the agreement, was clearly

It is now not necessary, in declaring on parol agreements, to set out the whole of the agreement, as formerly it was: it is sufficient to set out so much of it as is necessary to shew the gravamen of the complaint—the part to which the particular breach applies.

If the agreement for such a letting be delivered over, after signature, to the party interested, with an express verbal stipulation, that it is still to be subject to the landlord's being satisfied with the reference given him by the tenant, on the result of his inquiries, it seems it may be a proper question for the jury, to say, on an action for not performing the agreement,—whether, inquiry having been made, the answer given by the party referred to, was such as reasonably satisfied the condition; although the landlord declared that it was not satisfactory to him, and thereupon refused to let the tenant into possession, under the contract, on that ground.

A Plaintiff in such an action may give evidence of particular loss sustained by breach of such an agreement, if he have stated loss generally in his declaration. Therefore evidence of loss of business by Plaintiff's wife in her trade of milliner, held admissible in such a case as evidence of general damage, where no special damage on that ground was laid in the declaration, nor any customers named, nor any averment of her business introduced.

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agreement, agreed to let the Plaintiff part of his house, &c. (in the words of the agreement between brackets): and it stated, that it was agreed that the rent should commence at the time possession was taken; and that, in consideration of the Plaintiff promising, &c., the Defendant undertook and promised to perform the said agreement—alleging refusal, on request, *to permit the Plaintiff to take possession, and have the use of the premises, whereby the Plaintiff had sustained loss*, and been obliged to hire other premises, at great cost and expense for rent and charges. The second count stated the agreement to be for a year, to commence from the time when the Plaintiff should first take possession, and that it was agreed that the Plaintiff might be at liberty to enter and take possession whenever he chose to do so, after making the said agreement; and that it was not to be deferred beyond a reasonable time. The third count was on a common hiring and taking. Plea, *Non assumpsit*.

The cause was tried before the Lord Chief Baron, at the last sittings.

The Plaintiff's case proceeded on the agreement, which was proved; and he also called witnesses to prove that the premises, which were in *Regent-street*, and had been taken for the purpose of his wife's business, who was a milliner, were advantageously situated, and conveniently adapted for that trade; and that by not being suffered to occupy them, the Defendant had sustained considerable loss, from the passing by of a profitable part of the year

year for such business, in the mean time. Further, the person to whom the Defendant had been referred on the subject of the Plaintiff's responsibility, proved that inquiries had been made of him by the Defendant, and that he had given a satisfactory account, saying, that he had given the Plaintiff credit, and had been paid, and would trust him again.

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The defence was, that the agreement was signed by the Defendant in consequence of a treaty concluded with the Plaintiff's wife, expressly subject to the Defendant's being satisfied, on inquiry, with the references given to the Defendant by her as to the Plaintiff's circumstances and situation in life. That was proved by the Defendant's witnesses; and also that, on resorting to the person referred to for the purpose of making the necessary inquiries, the Defendant learned that the Plaintiff had once failed in business: and that was assigned as the reason why he had been rejected by the Defendant as his tenant.

The Jury, on the trial, found a verdict for the Plaintiff,—damages, 50*l*.

Lawes, E., now moved for a rule to shew cause why that verdict should not be set aside, and a new trial granted, on the following objections:—

1*st*, That there was a variance between the agreement as stated in the declaration, and that given in evidence in support of it,—the agreement entered into being for apartments and fixtures, forming one entire

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entire contract ; whereas the Plaintiff had stated merely an agreement for apartments : and he cited, in support of that objection, the case of *Clarke v. Gray* (a), where it was stated by Lord *Ellenborough*, in delivering the judgment of the Court, that in declaring on contracts not under seal, the entire consideration of the promise must be stated fully, and no part of the entire consideration for any promise contained in the agreement can be omitted. He also cited *Miles v. Sheward* (b), *Pool v. Court* (c), a note of a case of *Williams v. Pratt* (d), *Neal v. Viney* (e), and *Vansandau v. Burt* (f). The principle of the rule of pleading in such cases, he urged, was, that the promise cannot be split so as to enable a party to bring two actions on the same entire contract. In this case the promise was entire, and so was the consideration, and therefore the omission of any part in the declaration was a fatal variance.

[*Wood, Baron.*—The breach assigned is for not giving possession. A man may surely declare on one part of an agreement only, if there be a breach of one entire part : and if he do, it may be an omission, but it is certainly no variance. In this declaration, the breach is for not giving possession. Now to let the Plaintiff have the apartments was an integral part of the agreement, and might be broken independently of any other.]

(a) 6 East. 568.

(b) 8 East. 9.

(c) 4 Taunt. 700.

(d) Cor. Abbott, C. J., *Mid-
dlesex Sittings after Easter 1822.*

(e) 1 Campb. 471.

(f) 5 Barn. and Ald. 42.

Secondly,

Secondly, He submitted, that as evidence was given of the result of the inquiries in consequence of the reference, and that it was not satisfactory to the Defendant; and as it was clearly proved that that stipulation formed a condition precedent to the agreement taking effect, for otherwise it was to be wholly void, the Plaintiff was put out of Court; for the agreement was merely in the nature of an escrow till the Defendant had satisfied himself on that point. On that part of the case, he contended that the question was not whether the reference was such as ought to have satisfied the Defendant, but whether he was satisfied in point of fact; and such agreement being in fact and in law a conditional agreement, it could not be acted upon, or made the subject matter of an action, without proof of the condition being satisfied: *Johnson v. Baker* (g).

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Lastly, It was urged, that evidence had been improperly received on the trial, in order to augment the damages, of loss sustained by the Plaintiff in his wife's business, which was objectionable on these two grounds: 1st, that there was no special damage averred in the declaration; for that there were no particular customers named therein, as having withdrawn their custom from the Defendant's wife; and, secondly, there was no averment of the business of the wife, or that the Plaintiff had sustained any loss in her business. And, 1st, as no special damage had been stated in the declaration, parti-

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The order was obtained on the following grounds of objection taken to the proceedings on facts* brought before the Court by affidavits :

First—that the affidavit on which the Fiat for the Extent had been granted, did not state *any fact* within the deponent's knowledge from which he inferred the insolvency of the Defendant.

Secondly—that *the only evidence* which had been *laid before the jury* on the taking the inquisitions, both on the commission and on the extent issued thereon, of there being any debt due to the Crown from the Prosecutors of the Extent, or from the Defendants to them, was the affidavit of *William Robins*, one of the partners in the firm of the banking-house who prosecuted, on their own behalf, this extent in aid on which the fiat had been obtained.

Lastly—that there was no averment that there had been a breach of the condition of the bond of the debtors of the Crown so as to bring them within the 4th section of the statute of the 57th of *Geo. III.*

[Mr. Baron Wood observed, on this objection, that the sum secured by the bond was still a legal

* As this case is in itself of so great novelty, and must be necessarily attended with very important results in effecting a total alteration in the old practice of taking Inquisitions on Extents, it has been considered necessary, lest any misunderstanding should hereafter arise with respect to the precise circumstances on which the determination was founded, to set out *all* the facts of the case in detail, and with more than ordinarily minute particularity.

debt

debt in the eye of the law, although the condition should not be broken.]


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The affidavit on which the Fiat for the Extent had been obtained (which was on the 9th of *February*) was made by *William Robins*, one of the persons in whose aid the process was sued out. It was in nearly the usual form, stating that the deponent together with the other prosecutors of the extent were bankers and co-partners, and that they and another person their surety) were *by bond* (&c.) dated the 11th of *April*, 1820, jointly and severally bound to the King in 1500*l.* conditioned that [the principals] should from time to time pay to the Commissioners of Excise, or to their order, at the chief office of Excise in *London*, all and every the sums and sum of the King's money which they should receive from the Collector of the Excise, and other duties for a certain district—that the bond was still outstanding and undischarged—that they (the principals in the bond) had, since the date and execution thereof, received from the Collector divers large sums of money, and were then (at the time of swearing the affidavit) *justly and truly indebted to the King, as such receivers as aforesaid, in the sum of 5200*l.* and upwards.* The deponent then stated (in the same affidavit) that *William Hornblower* was *justly and truly indebted to the deponent and his partners, in the sum of 5100*l.* and upwards, for cash notes, money lent and advanced, and paid, laid out and expended by the deponent and his co-partners to and for his use—that the sum of 5100*l.* was a debt originally due and owing*

to

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to the deponent and his co-partners, in their own right, and not in trust, &c.—and that the same had not been sued for in any other Court.

The affidavit also stated that *Hornblower* “ was
 “ in embarrassed circumstances and insolvent and
 “ not able to pay his just debts the said *William*
 “ *Hornblower* having informed this deponent that
 “ he was incapable to pay the said sum of 5100*l*.”
 —concluding with the usual averments.

In the affidavits made and filed in support of the present application to set aside the extent &c., it was stated that a commission of bankrupt, bearing date the 13th of *February* last, was issued against the Defendant, under which assignees were appointed, to whom the Defendant's effects had been regularly assigned :—that the deponent had been informed and believed that upon the above-mentioned affidavit of *Robins*, and the bond therein mentioned, a commission had issued out of this Court to inquire whether the prosecutors of the extent were indebted to His Majesty ; and that an inquisition was taken thereupon, whereby they were found to be indebted to the King in the sum of 5200*l*., and that a writ of extent was issued out of this Court, dated the 8th of *February* last, against them—that upon that writ of extent an inquisition was taken, whereby *Hornblower* was found to be indebted to the prosecutors of the extent in the sum of 5100*l*., and that thereupon a writ of extent in aid of the prosecutors of the extent was issued against him, bearing

ing date the 9th of *February* last. The deponent also stated he had been informed and believed that it was the practice of the collector, at the end of every week, to receive from the prosecutors of the extent a bill or note payable in *London* at fifteen days after date, in exchange for such sums as had been paid to them; and that, at the time the above-mentioned affidavit of the prosecutors' being indebted to the Crown in the said sum of 5,200*l.*, was made, the sum of 1,035*l.*, part of the said sum of 5,200*l.*, had been previously paid to the collector by the prosecutors of the extent, in a bill or note, at fifteen days after date as aforesaid, pursuant to the condition of their said bond; and that the remainder of the sum of 5,200*l.* was paid to the said commissioners, by bills as aforesaid, on the day of the date of the said writ of extent in aid, and which bills, as the deponent had been informed and believed, had been duly paid and satisfied—that he had been informed, and believed that, at the time of the issuing of the said extent against the prosecutors of the extent, the said bond had not been in any way forfeited, nor the condition thereof broken—“ that
 “ *he had been informed, and believed that, upon the*
 “ *inquisition taken under THE SAID COMMISSION to*
 “ *inquire whether any debt was due from the pro-*
 “ *secutors of the extent to the Crown, and, upon the*
 “ *inquisition taken under the said writ of extent*
 “ *against them, no other evidence was produced,*
 “ *or shewn to the jury, to prove or identify the*
 “ *debt due from the prosecutors of the extent to*
 “ *the King, or to prove or identify the debt due*
 “ *from the said William Hornblower to them, than*
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“ the said bond, and the said *affidavit*, in writing,
“ of the said *William Robins*.

In one of the affidavits filed in support of the motion, it was stated that, in or as of Hilary Term last, a commission was issued out of this Court, directed to *James Burchell* and *James Anderson*, gentlemen (the usual commissioners for *Middlesex*), reciting, that the prosecutors of the extent were indebted to the King, for money arising from the duties of the excise, paid into their hands by a collector of excise, giving them power to inquire, as well on the oaths of good and lawful men of the county of *Middlesex* &c. (stating it to be in the words of the usual form of the commission to find debts)—that the commissioners returned an inquisition, under the said commission, on the 8th day of *February* last, taken before them, on the oath of the jury therein named, whereby the jury found that the prosecutors of the extent were, on the day of taking that inquisition, indebted to his said Majesty in the sum of 5,200*l.*, being his Majesty's monies arising from the duties of his excise, &c., had and received by the prosecutors of the extent, for the use of his Majesty. The deponent also stated that he had been informed, and believed that *there was not any witness examined before the jury, on taking the said inquisition, executed under the said commission, but that the only evidence submitted to the jury, on taking the said inquisition, was a certain affidavit, &c.* (stating the affidavit, which was that of *William Robins* before mentioned, on which the fiat had been obtained).

In

In another affidavit it was stated that, in or as of Hilary Term last, a writ of extent was upon the last mentioned inquisition issued out of this Court, directed to the Sheriff of *Middlesex*, reciting the said bond in the said affidavit mentioned, and the said inquisition, by virtue of the said commission, and that by such writ of extent the sheriff was commanded to inquire (in the usual form and mode) what debts, credits, specialties, and sums of money, the prosecutors of the extent then had in his bailiwick, and the same diligently to appraise, and extend on the oaths, &c., and to take and seize the same unto His Majesty's hands—that the Sheriff of *Middlesex* returned an inquisition, taken under the said writ of extent, on the 8th of *February* last, whereby the jury found that the said *William Hornblower*, on the day of taking the said inquisition, was indebted to the prosecutors of the extent, in the sum of 5,100*l.*, for cash notes, money lent and advanced, paid, laid out, and expended by them, to and for his use, which debt, the sheriff, on the day, &c., had seized, &c. And the deponent concluded by stating, *that he had been informed, and believed that there was not any witness examined before the jury on the said inquisition, executed under the said writ of extent, but that the only evidence submitted to the jury, on taking the said last-mentioned inquisition, was the before-mentioned affidavit, in writing, made and sworn by one of the prosecutors of the extent.*

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By another affidavit, it was stated that, on the 16th of *April* last, a memorial was presented to the

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Commissioners of Excise, on behalf of the said *William Hornblower*, shewing [the facts before stated]—and (further) that *Hornblower*, the memorialist, had been informed, and believed that all monies which had been received by the prosecutors of the extent for or on account of the duties of excise, at the time of the date of the said affidavit of the said *William Robins*, were, or had been duly paid or accounted for to the satisfaction of the said commissioners, pursuant to the terms and condition of the bond mentioned in that affidavit: and that the memorialist was, therefore, advised to apply to the Court of Exchequer to set aside the proceedings against him; but that he could not sustain the same without shewing to the Court that the said duties had been so duly paid: (praying the commissioners to give the necessary information on the subject)—that he applied at the office of the Commissioners of Excise, for the answer of the commissioners, when the report of the said collector for the *Stourbridge* collection was read over to him, whereby it appeared that, on the 2d day of *February* last, the prosecutors of the extent were indebted to His Majesty, in the sum of 5,308*l.*; and that two Bills of Exchequer, one dated the 2d of *February*, for 1,035*l.*, at fifteen days, which became due on the 20th of *February* last, and the other for 4,273*l.*, dated the 9th of *February*, payable in fifteen days, which became due on the 27th of *February* last (making together the said sum of 5,308*l.*), were remitted to the said commissioners, in liquidation and discharge of the said sum of 5,308*l.*

Affidavits

Affidavits were made of the course, in respect of proving the debt before the jury, by laying before them the affidavit, having been the regular and constant practice beyond memory: and that was not attempted to be denied.

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The *Common Serjeant, Campbell and Tindal*, now shewed cause.—They relied principally on the long usage and practice of the Court, in respect of the course which had been followed on the present occasion, of submitting to the jury the affidavit of the prosecutors of the extent, as evidence of the debt due from them to the Crown, and also of that alleged to be due to them from the Defendant, which formed the second objection * made to this extent, on the part of the Defendant, to which the Court had required the Counsel for the prosecutors of the extent, in the first instance, to confine themselves. They contended that, such having been always the constant and uniform practice of the office, and sanctioned by the Court, the present extent could not be set aside on that ground, because, if there were any objection to the practice which had hitherto obtained in that respect, whether as matter of justice or convenience, it should first be altered by a rule of the Court to be made for that purpose, which might regulate it on future occasions.

[*Wood, Baron*.—I have frequently, when applied to for fiats, told the Solicitors, that this was not

* It was upon this objection that the decision of the Court was founded.

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a legal practice, and that it must not be done, whenever my attention has been called to it.]

It was also urged that this was a question of too great importance to be determined on a summary motion, and that the Defendant ought to plead to the extent, that the objection might be formally raised on the record.


An objection was made to the insufficiency in the terms of the affidavits on which this rule had been applied for and obtained, in stating, as they did, all the material facts, not positively, but upon information and belief.

In respect of this being a case of first impression, it was urged that, if the Court should be disposed to allow the validity of the objection, the extent and fiat should, at least, be quashed *on terms*, as the prosecutors of the extent had merely followed the established and uniform practice of the Court in the conduct of the proceeding.

RICHARDS, *Lord Chief Baron*.—It is impossible that we can interfere, in the manner proposed, on the part of the Defendant. We are called upon, by this motion, merely to determine whether the objections, which have been made to this extent, are well-founded, in other words, to say, whether the extent has been well issued or not. I am clearly of opinion that it has been improperly issued, because the fiat upon which it was obtained was founded on an inquisition improperly taken: and, therefore, it must be set aside.

GRAHAM,

GRAHAM, *Baron*.—This practice of establishing the debt before the jury, certainly appears to have been very long the usage; but we have, on former occasions, set ourselves right where we had reason to consider that we had been long in error, as in the case of a practice which had prevailed for a long period in this Court, of suing out extents on bills of exchange, before they had arrived at maturity(a).

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With respect to the present case, I am also of opinion that the extent was improperly founded, and therefore must be set aside.

WOOD, *Baron*.—I am also of the same opinion. There are two things necessary to be done before an extent can be properly issued, without which it cannot be supported. First, an affidavit must be made to be produced before the Judge, and, then, an inquisition must be taken before a jury. Now, all inquisitions so taken before a jury, can only by course of law be taken on vivâ voce testimony produced before them. In this case, there was no such testimony, consequently the jury proceeded without legal evidence, and that is alone quite a sufficient reason for setting aside this extent.

GARROW, *Baron*.—I am glad that the present order is to be made absolute on this single ground, for if, hereafter, any officer of the Court should

(a) His Lordship probably alluded to the case of the King v. Bebb and others, Hughes's Report.

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presume to sue out an extent, under similar circumstances, the Court must necessarily decide that it shall not be upheld. The nature of the process requires that it should be strictly correct in all its stages. The seizure of a Defendant's person and effects is, in most instances, the first intimation that he has of it. The party, who may be, in fact, a very responsible person, cannot know, generally speaking, except from information or by accident, that, on the taking of the inquisition against him, no witness was examined before the jury, and that the only evidence given of any debt being due from him, was an affidavit of this description. That is stated to have been the course pursued on the present occasion, and, although it has been objected that the affidavits of the facts are founded on information and belief, yet, in the present case, I think that is quite sufficient, because the party has, in such cases, seldom any better means of knowledge. That statement is not contradicted, as it might easily be, if it were not true, and, therefore, I should myself believe it; but, besides this, the fact is assumed in the argument, which seeks to justify it on the ground of its being the constant practice. I, therefore, fully concur in the opinion that this fiat ought to be quashed, and the extent set aside, for the reason which has been given.

Per Curiam,—Make the

Order absolute,

Without Costs.

OBSERVATIONS ON THE PRECEDING CASE.

THE determination in this case necessarily has the effect of changing for the future what had been the invariable course of practice in this respect during the memory of the oldest clerks in Court, none of whom are aware, from experience or tradition, of any other usage having been ever observed even before their own time. On this consideration, and from the circumstance of the objection raised on the motion having been but very little discussed in the course of the argument, as is apparent from the report, the following observations, extracted from an unpublished work already adverted to in a former volume of these reports*, are submitted to the attention of the reader. They may serve to illustrate, by way of comment on the practical result of this decision, the nature of the course of proceeding in such cases, as heretofore established by the common usage of the Court in enquiries of this sort, shewing the reasons and principles on which it may be considered to have been founded, deduced from the general practice and particular constitution of this Court. They may probably tend in some measure to vindicate the hitherto accustomed course in taking such inquiries; at least they will explain whatever of anomaly there may be thought by some to exist in the nature of the proceeding.

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* Vol. 8. p. 374. Observations on the case of the King v. Giles.

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It is remarkable, and should be noticed preliminarily, that it does not appear precisely to which of the inquisitions impugned for irregularity the main ground of objection taken in the argument at the bar is to be applied, as that on which the determination of the Court in the case of the *King v. Hornblower* proceeds. Although it was held that the vice of the proceeding there consisted in laying before the jury an affidavit of the debt in proof of its existence, whereas it should have been established before them by *vivâ voce* testimony—yet it does not appear distinctly from the reasons of the judgment whether that objection was successfully directed against the finding of the jury on the inquisition taken under *the commission* issued to find the debt due from the prosecutors of the extent to the crown, or against the finding on that taken under *the extent* which was thereupon issued to find and seize debts due to them on the return of the first inquisition taken on that commission. As the case stands, we must take it that it applies to both, for the determination is put on the broad ground of an affidavit not being evidence before a jury *in any case*. The following observations will therefore be marshalled to meet the objection, first, as an universal proposition, generally applying to inquisitions taken as well on commissions as on every species of extent; and, secondly, more particularly as not being applicable at least to inquisitions taken on commissions issued *merely for the purpose of finding debts*.

For the present, the very important consideration,

tion, which formed the only argument submitted to the Court against the motion made in the *King v. Hornblower*, of the long-continued and established usage of the Court, by which the practice, now for the first time objected to, has been sanctioned, may be passed by, as having been unsuccessfully urged to the Court when the question was raised, when it was not considered an available argument in answer to the objection.

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It may be observed, however, that in respect of the prerogative, more authority and weight has ever been assigned in this Court to any established course of practice, as we find from the oldest cases which advert to the *cursus scaccarii*, than to the usages of either of the other Courts. It should not be overlooked, at the same time, that the proceeding by extent is itself founded wholly on prerogative, which (it is said) “is in itself a prescription, and “rests in usage” (b); and even common persons suing in the Court of Exchequer under the surmise of *quo minus* &c. are considered “participant of “the prerogative of the King” (c).

Independently of such considerations, it will be found, that plausible as the objection taken and successfully pressed in support of the motion in the *King v. Hornblower*, may at first appear to be, it cannot be applied to proceedings of this nature, without shaking the principles on which the general practice of the Court, as a Court of Revenue,

(b) The case of *Mines*, Plowd. Comm. 322.

(c) *Stradling v. Morgan*, lb. 208.

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is founded and proceeds,—more particularly if it be intended to be applied not only to proceedings on extents in aid, sued out against the debtors of the Crown debtor, but also to inquisitions taken on commissions or extents issued for the purpose of finding, and thereupon recording in the ordinary manner debts due immediately to the Crown. Whatever weight it may be thought that the objection ought to have as it respects the former proceeding, it would considerably paralyze the prerogative power of the Court of Exchequer, as a Court for the speedy recovery of the King's debts, and for enforcing a priority of payment of the demands of the Crown before those of the subject, if it were to be extended to the latter.

The legality of the course of taking inquisitions, as heretofore generally taken in all cases, according to the ordinary practice, which has been thus successfully objected to, may be referred to the two following sources,—first, the peculiar prerogative object, and nature of the proceeding itself: and secondly, to the power and constitution of the Court of Exchequer, considered with regard to the subject-matter of its authority, and the extraordinary means which this court exclusively possesses of enforcing that authority, to meet the emergencies of its important duties.

On the first point it may be observed, that the inquisition, which is an office of instruction merely, and not of entitling, is not a proceeding which concludes the rights of the party; the whole ob-
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ject of the inquiry itself, in the first instance, and of all those further inquisitions which subsequently take place upon it, is to put the debts found by them to be due to the Crown or the Crown's debtor on record, in order that the Crown, or the party employing the prerogative process, may thereupon obtain the usual fiat for the extent against the Crown debtor or the debtors of the Crown debtor. The proceeding founded on such inquisitions—the seizure by virtue of the extent issued thereupon—has been said to be in the nature of an execution,* whereas in fact it is nothing more than the Crown's arrest, which is a mixed proceeding, directed at once *in rem et in personam*, partaking of the double nature of the *capias* and *distringas*, to compel appearance *and claim*. It only differs from that of the subject in that it extends not only to the person but to the property of the debtors to the Crown, and of their debtors to the third degree, in aid of the immediate debtor to the King, where it becomes necessary to enable him to pay the Crown's debt, and it can be shewn that they are insolvent : and it is no more or otherwise in the nature of an execution than the ordinary bailable process suable by the subject on making the usual affidavit of his debt. The right still remains to be determined by a jury between the Crown and the party, unprejudiced by the inquisition, the object of which was only to found a proceeding for securing to the Crown, in behalf of the public revenue, in virtue of its ancient prerogative preference, the

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* See Observations on the case of the *King v. Giles*, *ante* vol. viii. p. 395. *et seq.*

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property of an insolvent debtor (*d*), whose inability to discharge the debt due to the Crown debtor might immediately or indirectly endanger the Crown's debt.

In this proceeding, if *the facts* on which it is required to be founded were, before it could be issued, necessarily *to be proved before a jury*, in the strict sense of the term, the fact of *the insolvency* should also be proved, as one of more immediate consequence, and more necessary to be established than even that of the existence of the debt; because proof of the debt alone would not be sufficient to authorize the extent to issue, unless, without that immediate process, it were, from the embarrassments of the party, in danger of being lost.

Then it is assumed, in the argument resorted to in the case under consideration, that the persons by whom the inquisition is directed by the commission to be made, are a jury in the common acceptance of that term,—twelve men sworn to determine a *disputed* fact between *litigating* parties: and it is said that an affidavit or written testimony cannot be used in evidence before such persons, *because they are a jury*. Neither of these assumptions

(*d*) The foundation of this proceeding, it must be borne in mind, is by analogy to "the ancient practice touching real *estates* *." Formerly, when the feudatory owed the crown service, he forfeited his feud, and his person and property were subjected to seizure; and, like an outlaw, an insolvent crown debtor forfeited the King's protection, and his goods were considered derelict.

* Gilb. Tr. on Exch. p. 118.

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appears to be founded in the truth. The persons by whom the inquisition on a commission is to be made, are not, strictly speaking, a jury,* for they are not summoned to determine any question as yet disputed. But even if they were such a jury, yet it is within the power of the Court of Exchequer, in the exercise of its equitable jurisdiction as a Court of revenue, having authority to enforce and support the charge of the high trust with which it is invested, to direct, as matter of expedience, that affidavits shall upon all such occasions be received in evidence : and it should be borne in mind, that in all such cases the inquisition is taken before persons summoned on a mere *ex parte* inquiry for a special purpose, to satisfy the conscience of the Court in the exercise of an act of duty in respect of its charge and care of the public revenue for the advantage of the community—the issuing of an order for the arrest of the person and property of a Crown debtor. That power it constantly exercises when sitting as a Court of Equity, adjudicating between individual suitors, when it sends to a jury an issue of fact, directed by the Court to be tried, solely for its own satisfaction ; in which case the verdict, as having no other or concluding ob-

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* The statute passed in the 1st of Henry the 8th, ch. 8., to prevent Escheators and Commissioners returning inquisitions or offices * concerning lands, tenements, and hereditaments, unless found by the oaths of twelve men, was made expressly to operate as a check upon those officers who are recited in the preamble to have caused untrue offices to be found, and to have returned offices which never had been found, and to have altered such as had been truly found.

* Offices regarding chattels, however, are mere offices of instruction.

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ject, it may therefore *toties quoties* reject ; as in cases where, for the sake of justice, it orders depositions taken *in perpetuam rei memoriam* or otherwise, or documents not regularly admissible, to be read and admitted as evidence on such trials, under circumstances where, by the ordinary rules of evidence, they would not be received. That being so, it seems reasonable that the sanctioned immemorial course of practice of the Court in this respect should be regarded as at least equivalent to a standing rule to that effect ; and it is very probable that on such consideration the practice was at first founded.

It is also very material to observe the nature of the affidavit produced on such occasions. It is a solemn deposition, of a very special and particular kind. The materials on which it is founded, where the object of it is a debt due from an immediate debtor of the Crown, are public documents, and it is in all such cases made by some known public officer employed in the collection of the revenue, or by some official person connected with one of the revenue boards, or belonging to the office of a Crown solicitor ; for the commission issued for the purpose of finding debts is a proceeding used only in case of debts due to the Crown immediately by simple contract, as for money had and received, or otherwise, in respect of the public revenue, and for the recovery of which, when thus recorded, a *Scire facias*, or immediate extent, might be issued. Where the affidavit of the debt due to the Crown is made, as it may be, by the Crown debtor himself, if, in consequence of the insolvency of his debtor, he thereby becomes
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the less able to pay the debt due from himself to the King, he swears that he is indebted to the King in a certain sum of money; and he must state in the affidavit, particularly, how, by what means, and on what account, that debt became due. He then swears that his debtor is indebted to him in a certain sum of money generally, without stating the nature of the debt, or any particulars respecting it. He then alleges the insolvency of his debtor, and some fact indicative of it, and concludes with the usual *quo minus* averment. In the first case, the Crown debtor first charges himself on oath with the amount of the debt due to the King. In both cases the affidavit must state fully and particularly, in the most specific and authentic manner and form, the existence, amount, and consideration of the debt due to the Crown. An inquisition is then taken under the authority of a commission; and an extent is issued on the inquisition taken and returned thereon, and upon producing all three before the Chancellor of the Exchequer, or the Chief, or some other Baron, the fiat for an extent is granted against the persons found by the inquisition on the return of the commission filed of record to be indebted to the Crown.


But whatever may be the general doctrine on this point, as affecting inquisitions taken on extents in general, whether in chief or in aid, there are still, even if it should be considered that the objection does attach in cases of extents in aid, other strong grounds, for excluding it in cases of inquisitions founded on commissions or extents to find debts,

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which are not touched by the objection. Between the former and the latter there are very essential distinctions in many important respects. Those distinctions, in order to understand these observations arising on the law of the Court of Exchequer, as formerly established by the accustomed usage though now shaken and indeed altered by the authority of the case of the *King v. Hornblower*, it will be materially necessary to shew, in support of the proposition, that if the objection on which the decision in the *King v. Hornblower* was founded be valid, as applied to inquisitions taken on extents in aid issued on inquisitions taken under commissions to find debts, it still ought not to prevail against the prior inquisitions founded on those commissions, or on extents issued merely to find and record debts due immediately to the Crown from incompetent debtors, and from insolvent debtors to them. Whatever weight there may be in the objection to the proof before the jury of the debt due from the debtor to the Crown's debtor being made merely by affidavit in the case of an adverse extent in aid, it cannot be on any principle applied to the first proceeding in use by the course of the Court to find the debt due to the Crown; because the nature of the proceeding is so distinct in each case in its object and result, as that the rules which regard the one cannot apply, on the reason of those rules, to the other.


The obvious inherent qualities by which the former species of inquisition, considered both with regard to its nature and object, is distinguished from the latter, are sufficient to shew, that evidence
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which might be legally admissible in one case, could not be properly received in the other. By the inquisition on a commission, or on an extent to find debts, it is never required to find or seize property, there being no mandate in the writ directing that to be done by the Commissioners. Such inquisitions are essentially and constitutionally prerogative *ex parte* proceedings between the Crown and its officers, without notice to or communication with the party, and without having any express immediate object consequent on the finding of the debt: and as cross examination or adverse proof could not be admitted for any purpose of such an inquisition, the principle of utility which recommends *viva voce* testimony in cases where juries are to determine between parties, cannot be insisted on in such inquiries. That inquisitions on commissions to find debts are *ex parte* proceedings, is clear from this, that notice is not necessary to be given, and consequently never is given, to the party whose interests the measure may ultimately seriously affect. Inquisitions taken on adverse extents in chief or extents in aid, under which property found is to be returned and seized, on the contrary, it may be said, are not *ex parte* measures invariably and inherently, but incidentally, and not as against strangers to the proceeding; for although, as the cases and the practice shew, notice is never in fact given of the taking of such inquisitions, that arises from the distinction which subsists in that respect also between the two proceedings. The reason why notice is never given of the taking of an inquisition on an extent in aid is, not that it is wholly and purely an *ex parte* proceeding,

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proceeding, and therefore not necessary, but because in such case there is no person to whom notice could be particularly addressed. In the case of the King v. *Bulley* and *Blommart* (e), the reason why that proceeding is in fact and practice carried on *ex parte*, is truly stated. The Court there said, that “notice in this case (an inquisition on an extent in aid) cannot be given, because every body may be concerned, and therefore there is nobody particularly to give notice to.” That necessarily goes to admit, that if there were any one to whom notice could be addressed, it ought to be given. Consequently, the reason why notice is not given in such a case, is not because it is an *ex parte* proceeding, but because it is impossible to know to whom notice is to be given. The reason given in the case in *Bunbury* is founded upon this—that it cannot be anticipated or assumed, that on an extent against the debtor of a Crown debtor, the property of any other person will be seized; and if by accident the goods of another should unintentionally be taken, as being ostensibly the property of the party against whom the process has been issued, in such case it cannot be known beforehand who may be the true owner, if indeed any one has or may urge a claim. By the notice alluded to in that case, therefore, must be meant the notice which should protect the property of a *stranger* from the process against the Crown debtor, and not that of the Crown debtor himself; for it would be absurd to require that a party should give such a notice to another as would necessarily imply that he was knowingly about

(e) Bunb. 233.

to commit a tort or a trespass. In the case cited, too, it might be suggested, that the issuing and execution of the extent in aid, and the inquisition on which it is founded as being matter of record, would perhaps be considered notice to all the world. Now neither of those reasons exist for not giving notice of inquisitions to be taken on commissions to find the King's debts. In such cases the commission is not, like the extent, matter of notoriety and publicity, nor founded on a previous record, and therefore cannot be notice to any one. In the inquisition directed to be taken by such writs, too, there is a particular person, and a particular purpose, designated by the mandate, to whom, and of which, if notice were necessary, or if the party were, on any principle, legally entitled to be apprized of the proceeding, it might and ought to be given.

In practice, therefore, it may be considered as indisputable, that the *first* proceeding is wholly *ex parte*, and that no notice is necessary.


It is equally clear, on the other hand, that extents founded on inquisitions are not in their nature entirely *ex parte* proceedings ; but that strangers, if they come by any accidental means to a knowledge of the proceeding, may come in and establish before the jury a claim of property.

Another consideration is, that the persons to whom the taking of the inquisition is committed in such cases, differ altogether from each other in respect of the nature of their appointment and authority

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thority—their power and the matters with which they are charged.

The commissioners appointed by the commission or extents to find debts are to be considered as in *loco Curia*, and as representing the Court of Exchequer, clothed with a judicial character in the execution of the writ by pursuing the inquiry as to the Crown debt under that special authority, without any ulterior object expressed or consequent duty to perform : nor are they armed with any hostile or adverse power by the commission, to seize any property found in the result of the inquiry on the return of the commission. The Sheriff, on the other hand, proceeds, in the execution of the process of extent, to take the inquisition thereon *virtute officii*, as a ministerial officer. It is his duty also to execute the extent adversely, by a seizure of the goods and property, which those by whom the inquiry is to be prosecuted shall find to belong to the person against whom the process is awarded ; for he is commanded to take and seize into the King's hands whatever debts, &c. shall be found to be due to the party, a subject, from other subjects.

The commission itself is issued as of course by the clerk in court for the Crown in the Exchequer Office, and the inquisition taken thereon is usually and for the most part taken in *Middlesex*, by virtue of the prerogative privilege, in whatever part of the kingdom the debt to be inquired of may have arisen and accrued due ; whereas the inquisition *on an extent* is taken in the county into which the process


is

is sent addressed to the Sheriff for execution, and it is executed there before the Sheriff of such county and a jury of his bailiwick. The obvious inconvenience and expense, therefore, of producing before a *Middlesex* jury, a collector of excise, and bankers to whom they may have paid the King's money, from the farthest part of the kingdom, which would materially obstruct and embarrass the proof of the debt due to the Crown, is a strong reason for permitting the practice to prevail in one case, whereas no such reason exists in the other, for supplying the oral testimony of witnesses who are most probably already on the spot, by an affidavit or written deposition, however solemn and authentic. The two inquisitions, moreover, are taken *diverso intuitu*. The object of an inquisition on a commission, or an extent to find debts, is to put the Crown debt *in pais* upon record, and that only : that is not the *object* of an inquisition on an extent issued on the return of the first inquisition, although it is necessarily the *effect* of it as to the debt due to the Crown debtor, for the Crown does not proceed against the debtor of its immediate debtor as a debtor to the Crown of record, but in virtue of its right to seize the debts due to its recorded debtor as part of his available property*.

Considering, therefore, the nature and object of proceedings under extents not founded on judgments, which are merely to be regarded as mesne process to bring an insolvent, or person in decayed

* Gilb. Treat. on Court of Exchequer, p. 178.

circumstances,

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circumstances, into Court to answer the Crown's demand, with the King's hands upon his insufficient property to secure the King's debt, subject, however, to all his own rights as against the Crown in respect of it, and the claims of all other persons thereon—considering also the nature and objects of the jurisdiction of the Court of Exchequer, its great powers and authority, its prerogative promptitude in exercising that jurisdiction, tempered by the equitable discretion with which, in consideration of its extraordinary power, it is invested by statute, and the subjection and controul within which, in every stage of these Crown proceedings, it holds them, and restrains their injurious operation—there appears to have been, in regard of such matters at least, sufficient authority in the Court to have sanctioned the old practice of taking inquisitions, and to have made the usage in that respect the law of the Exchequer. For the same reasons, on the other hand, the Court may perhaps have equal authority to abolish the practice, if found to be hurtful or inconvenient to the Crown or the subject. All that appears to have been wanted, for either its entire abolition or permanent establishment, is the publicity and solemnity of a promulgated Rule of Court.

SMITH v. BRISCOE.

1822.

*Monday,
10th June.*

ON shewing cause against this rule, for setting aside an award, the Court observed that the rule did not state the grounds on which it had been obtained, and, referring to the Master, he informed them that it was not the course of this Court to do so.

It is now a rule in this Court that, in all orders to shew cause why awards should not be set aside, the short grounds on which they are applied for and obtained, shall be stated therein.

Mr. Baron GARROW thereupon suggested to the rest of the Court the propriety of making it a rule, that, in future, that should be required to be done in all cases, as a more convenient course, and according with the practice of the Court of King's Bench, founded on reason and good sense.

The Court, upon that suggestion, adopted the measure, and declared that it should henceforth be considered to be the rule of this Court.

1822.

Tuesday.
11th June.

LUDLOW v. GRAYALL.

A remainder-man having sold property to a purchaser, by whom money is advanced to pay off a heavy and pressing incumbrance, the remainder-man representing himself to have a right to sell with the concurrence of the tenant for life for that purpose; whereupon a draft of conveyance is prepared, to which the tenants for life and remainder-men are made parties, and the purchaser takes possession: gives such an equitable title to the purchaser, as having cleared the estate from a charge to which the tenant for life was liable, as to establish a lien on the property, which equity will protect by enjoining the tenant for life from proceeding by ejectment to obtain possession until the cause shall be finally determined on the hearing, whatever case may be made by the answer on merits stated on the part of the defendant in equity.

MARTIN and *Wilbraham* shewed cause, upon the merits, against the common order *nisi* for dissolving the injunction which had been obtained in this case, restraining the Defendant from further proceeding in the action of ejectment which had been brought by him against the Plaintiff, or bringing any other action against the Plaintiff, for the recovery of possession of the premises in the bill mentioned.

The substance of the Plaintiff's equity, as stated in the bill, was this:—

Thomas Baker by his will devised the premises, upon trust, to permit his wife to take the profits during her life, and after her decease to permit his sister, *Ann Grayall*, the wife of the Defendant, to take the rents, issues and profits during her life; and after her decease he devised the premises equally between his three cousins, *James Baker*, *William Baker*, and *Henry Baker*, and their respective heirs as tenants in common. *Ann Baker*, who afterwards married *Daniel Baker*, entered into the possession and receipt of the rents and profits. The bill then stated that in 1815, the wall and bank which formed the boundary of the lands devised, adjoining to and on the side of the river *Severn*,
had,

had, from long neglect, been blown up, broken down, and washed away ; and that at a Court of Sewers a presentment was made by the Jury to that effect ; and they also found that *Daniel Baker*, by reason of his tenure ought, at his costs and charges, to repair the wall and bank. By various presentments it had been found that the costs and charges of the necessary repairs amounted to 2,543*l.*, and under them the property was assessed at that sum ; which exceeded the value of the estates for life of *Ann Baker*. *Baker* and *Grayall* therefore declined to pay such sums, and it was thereupon agreed between *Baker* and *Grayall*, and their wives, and the *Bakers* (the remainder-men), that the possession of the premises should be delivered to them (the *Bakers*), upon their indemnifying the other parties against all fines, costs, charges and expenses incident upon the presentments. An agreement was afterwards signed by *Thomas Stokes*, the then solicitor acting for *Grayall* and his wife, for the purpose of expressing their concurrence in that arrangement ; and it was thereby agreed that *Baker* should give up the estate comprising, &c., being indemnified, &c. It was then stated by the bill, that on the 15th of *March* 1817, the *Bakers*, for the purpose of discharging some part of the expenses which had been incurred in the building or repairing the wall and bank, agreed with *James Cawthorn*, the mason, to whom the sum of 1,300*l.* had become due on account of a part of the building and repairs done by him, for the sale of the messuage and lands thereafter mentioned (a part of the devised property) to him for the sum of

1,200*l.*,

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1,200*l.*, part of said sum of 1,300*l.* That agreement was reduced into writing, and signed by the *Bakers, Cawthorn, and Grayall* and his wife. Afterwards further expenses to a very large amount having been incurred, it was stated to have become necessary that the remainder of the premises should be sold, and that the *Bakers* having authority for the sale, contracted by an agreement, dated 6th *September* 1817, for themselves and *Grayall* and his wife, who were said to have abandoned their interest in the premises as subject to the said charges so exceeding the value, &c. as well for the sale to the Plaintiff of such of the premises as were not included in the agreement with *Cawthorn*, as for the sale of their right, title, and interest in reversion, expectant upon the deaths of *Ann Baker*, and *Ann Grayall*, in certain other hereditaments devised by the said will, in consideration of 4,000*l.* to be paid by the Plaintiff to the *Bakers*, and of the sums of 1,690*l.* and 850*l.* to be also paid by him in discharge of certain mortgages. Such agreement between the Plaintiff and the *Bakers* was reduced into writing and signed by them respectively; and *Grayall* and his wife were also named therein as parties thereto: and it was thereby in consideration of the sum of 5*s.* paid to *Grayall* and his wife, and of 1,000*l.* paid by Plaintiff to the *Bakers*, on the part of *Grayall* and his wife, and the *Bakers*, agreed to sell to the Plaintiff, his appointees, heirs and assigns, and at their expense to make out a good title to the premises, in all which, with the premises contracted to be sold to *Cawthorn, Ann Baker* and *Ann Grayall* were therein mentioned to have

have agreed, for certain valuable considerations, to relinquish their several estates for life to the *Bakers*, and, for the considerations aforesaid, the *Bakers* agreed to sell to Plaintiff all their right, &c. in reversion therein on the death of the survivor of *Ann Baker* and *Ann Grayall*. It was then stated, that the Plaintiff having paid 160*l.* in part of the said purchase-money of 1,060*l.*, agreed to pay the remaining 900*l.* upon having a conveyance made to him on the 21st of *December* then next; that in pursuance of the several agreements the Plaintiff caused the draft of an indenture of release to be prepared, whereby in consideration of the sums of 160*l.* and 900*l.* therein mentioned to be paid by Plaintiff to *Cawthorn*, and of a release therein contained of *Grayall* and his wife, and the *Bakers*, for the debt of 1,200*l.* mentioned in the agreement of the 15th of *March* 1817, by *Cawthorn*; and of 4,000*l.* mentioned to be paid by the Plaintiff to the *Bakers*, and by their direction, and of the sums of 1,690*l.* and 850*l.* to be further paid according to the covenants on the part of Plaintiff, and of the sea wall having been repaired, and the presentments taken off at the costs of *Bakers*, they, *Baker* and his wife, *Grayall* and his wife, and the *Bakers*, and *Cawthorn*, with other necessary parties were expressed to release and convey the premises devised by the will of *Thomas Baker*, and comprised in the several agreements to *William Perry*, his heirs, and assigns, to the use of Plaintiff, his appointees, heirs, and assigns. In the draft of the release was inserted a covenant from *Daniel Baker* for himself and *Ann* his wife, and by *Grayall* and his wife, to levy fines for the further

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further assurance of the premises. That draft was submitted to the solicitors of the respective parties, and amongst others, to *George Strickland*, who had succeeded *Stokes*, and then acted as the solicitor for *Grayall* and his wife, and was also the solicitor for *Daniel Baker* and his wife; and he perused and approved of it, and wrote thereon and signed his approval. *Strickland* afterwards wrote a letter on the subject of the conveyance from the parties for whom he was concerned, in *August* 1818, wherein he stated that if *Grayall* and his wife were liable to any expenses of repairs of the wall, under the contract with *Cawthorn*, they would expect that liability to be removed by the *Bakers*. The conveyance was afterwards executed by *Daniel Baker*, the *Bakers*, *Cawthorn*, and all the other parties thereto, except *Ann Baker*, and *Grayall* and his wife. The Plaintiff paid the sums of money to be paid by him upon the execution, a large proportion of which was applied to the payment of the expenses of building and repairing the sea wall and bank. The plaintiff was thereupon let into the possession and receipt of the rents and profits, and had ever since continued in such possession; *Ann Baker* died in *July* 1817. Under these circumstances the bill charged, that although the said conveyance was not executed, nor any fine *sur concesserunt* levied pursuant to the covenant therein contained, by *Ann Baker* or *Grayall* and his wife, yet under the said agreements, and by the payment of the expenses of the building and repairing the wall and bank, the *Bakers* and *Cawthorn* had become entitled to the beneficial interest of *Ann Baker*, and *Ann Grayall*, or *William Grayall*

all

all in her right, in the premises conveyed to, or for the use of the Plaintiff; and that the Plaintiff, after such conveyance, became entitled in like manner thereto, and had thitherto holden the possession of the premises accordingly.

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It was thereupon prayed that the Defendant might set forth a list or schedule of all such letters, accounts, statements, bills of costs, receipts, papers, and writings being in his possession, or that of *Strickland* his solicitor, and might produce &c. for the usual purposes: that it might be declared that the *Bakers* became entitled to the possession of the premises, as well against *Daniel Baker* and *Ann* his wife, as against the Defendant, in consideration &c.:—that the Plaintiff as claiming and being entitled to the said hereditaments, through them might be declared to be in like manner entitled to the possession thereof, as against the Defendant; and that the Defendant might be restrained from proceeding in the action of ejectment, and from commencing any other action, or taking any other proceedings at law for recovering the possession, or for disturbing the Plaintiff in the possession:—that the agreements of the 13th of *July* 1816, and the 11th of *March* 1817, and the 6th day of *September* 1817, might be decreed to be specifically performed and carried into execution by the Defendant:—that the Defendant might be decreed to execute, and to procure the said *Ann Grayall* to execute the conveyance, the draft of which had been approved, as mentioned in the bill; and to levy a fine &c., according to the covenant

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covenant therein contained, on their part, or that it may be referred to the said Master to settle and approve of a proper conveyance from the said Defendants to Plaintiff.

The Defendant in his answer denied that he and his were unwilling, or declined to pay their proportion of the several sums assessed, but admitted that they were unwilling to pay the whole amount of the assessments, being liable only to keep down, during the life of *Ann Grayall*, the interest of such principal sum of money as might have been properly expended in effecting the repairs of the sea wall. He denied that it was ever agreed that the possession of the premises should be delivered to the *Bakers* upon their indemnifying the tenants for life against all expenses incident upon the presentments, or that the written agreement in the bill mentioned, between the *Bakers* (if in fact any such agreement existed), was signed by *Stokes* under any authority from the Defendant and his wife, or by their concurrence or consent; or that *Stokes* had any power or authority from them to sign any such agreement, or that he was at the time their solicitor, save only that he was employed by them and by the *Bakers* jointly, to exhibit a bill against *Daniel Baker* and others: and alleged that he was not generally employed by them as their attorney, and had neither any general or special authority to sign on their behalf any agreement. It was also submitted, that the agreement mentioned in the bill was not a valid, legal, or binding contract as against the Defendants, as *Ann Grayall* was at the time a married woman,
and

and that, not being such a contract as is required by the statute of frauds, it could not be enforced in Equity. The Defendant denied that it became necessary for defraying the assessments, that the remainder of the premises devised should be sold ; or that the *Bakers*, or any of them had authority either under the alleged agreement of the 30th of July, 1816, or in respect of the purpose for which the sale was made, or otherwise to enter into such contract on behalf of the Defendant : and that he had abandoned his interest in the premises, or had ever signed any such agreement. It was also denied that *Strickland* had succeeded *Stokes* as the Defendant's solicitor, except for certain purposes mentioned in the answer, in proof of which he referred to *Stokes's* bill of costs delivered to him : and he alleged that *Strickland* had no general power or authority to act for him, and that he had no special authority to act in respect of the sale of the Defendant's interest in the said estate—that *Strickland* was the attorney of *Daniel Baker* and his wife; and that if he did in fact write or signify his approval of the draft, he did so under some mistake or misapprehension, as the Defendant never gave him any authority to do so.

Roupell, in support of the order for dissolving the injunction, submitted that in this case there was no privity between the Plaintiff and Defendant, and that whatever contract the Plaintiff might have entered into with other persons, as to the other tenant for life or those in remainder, there was nothing to bind *Grayall* ; and he ought not to be

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kept out of possession of his estate, because money which he might or might not be liable to pay, had been paid by another person without his consent.

RICHARDS, Chief *Baron*, relieving the counsel for the Plaintiff—The great difficulty is, that it is not denied that a considerable sum of money due in respect of this property from persons who were liable to pay it *ratione tenuræ* was, in fact, paid by the Plaintiff, in consideration of having the estate; and it is clear, that any one placing himself in the situation of a party entitled to the property, and liable to be first called on to pay off a burthen on it, by discharging it must also be considered in equity as in his situation, also, in respect of the title to hold it. Without therefore saying, whether the agreement relied on can be made out or not, or what may be the effect of it, that is quite sufficient ground for us to interfere at present, to prevent the possession being changed. The Plaintiff, supposing him to be a perfect stranger, has paid a large sum of money, to the payment of which the defendant was liable, and on that consideration he claims a right to keep possession of the property. The Defendant certainly had a right to bring the ejectment; but the Plaintiff had an equal right to file this bill. It prays a specific performance of an alleged agreement. Whether there was any such or not, or whether it were valid, is a question for another stage of this proceeding. Enough appears for the present on the bill and answer, to authorize us to prevent as yet at least any change of possession. The principal
ground

ground on which I proceed is, that it is clear that an existing charge on the property has been discharged by the Plaintiff, and that the Defendant has had the benefit of that discharge. The Plaintiff has therefore an undoubted lien at least, and, from the result of his dealing with the *Bakers*, is in a situation to be entitled to be considered under all the circumstances as a mortgagee as against the Defendant.

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The question, whether the Defendant is only, as he says, liable to keep down the interest, must be discussed in a more formal manner; but in the mean time, we can not suffer him to turn the Plaintiff out of possession, by the effect of the proceedings at law, merely because his title is only an equitable one, when it is not denied that he or the *Bakers*, through his means, have cleared the Defendant's estate from the charges to which it was undoubtedly subject.

GRAHAM, *Baron*. It is clear, that some agreement must necessarily have taken place between *Grayall* and the *Bakers*, in consequence of the enormous and pressing incumbrances upon the property; and the agreement with *Cawthorn* shews that *Grayall* felt himself unequal to the burthen of the charge, and incapable alone of meeting the heavy demands made on him in respect of it. If so, it would be unfair to deprive the person, by whom the money has been advanced to meet the exigencies of the occasion, of the possession of the property, on the faith of which he paid off the charge.

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Whatever questions there may be respecting the rights of the parties, they will still remain to be formally investigated, when the Defendant may establish his case by evidence. For the present, I have no hesitation in saying the injunction must be continued.

WOOD and GARROW, *Barons*, expressed themselves of the same opinion.

Order discharged : Injunction continued.

It was suggested, that the Defendant might still be permitted to enter up his judgment, to which the Court assented.

Tuesday,
11th June.

IN THE MATTER OF W. I. CLEMENT.*

The publication of what passed on the trial of some of several prisoners indicted for the same offence at a

Court of gene-

ral Gaol-delivery, after an order had been promulgated by the Court prohibiting such publication until all the trials should be concluded, is a contempt of Court, and punishable by imprisonment or fine : and if the offending party being summoned to attend the Court to answer for the contempt, by order issued for that purpose, should not appear, the Court has power to impose a fine on him in his absence.

PLATT now moved, in pursuance of notice to the Attorney and Solicitor General and the Solicitor of the Treasury, for a rule to shew cause " why "*William Innell Clement* should not be discharged

Service of such an order, by leaving it with the servant of the party, (who was printer, publisher, and sole proprietor of a newspaper), at the newspaper office, is good service.

The Court of general Gaol-delivery has jurisdiction to make such orders : and the Court of Exchequer refused to grant a rule Nisi for the discharge of a party from such a fine, on an application made to them for that purpose, after it had been estreated into the Exchequer, on the ground of the illegality of the proceeding ; holding that the fine might legally be imposed, and that the present was a fit case for the imposition of such a fine.

* See the case of the King v. Clement, 4 Barnew. and Ald. 218.

" from

“from a certain fine of 500*l.*, (imposed by the
 “Court for the delivery of the King’s gaol of
 “Newgate, holden for the county of Middlesex,
 “by adjournment, at Justice-Hall in the *Old*
 “*Bailey*, in the suburbs of the city of *London*,
 “on the 28th of April, 1820, upon the applicant,
 “as the printer, publisher, and proprietor, of the
 “*Observer* newspaper, for unlawfully and con-
 “temptuously printing and publishing, in the said
 “newspaper, the trials of *Arthur Thistlewood* and
 “*James Ings*, for high treason, pending the pro-
 “ceedings against *John Thomas Brunt* and others,
 “who were included in the same indictment with
 “the said *Arthur Thistlewood* and *James Ings*, for
 “the same high treason, contrary to the order* of
 “the said Court of delivery of the King’s gaol
 “ of

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* The several orders were, as follows:—

[ORDER OF PROHIBITION.]

MIDDLESEX.—At the delivery of the King’s gaol of Newgate
 holden for the county of *Middlesex* (by adjournment) at Jus-
 tice-Hall in the *Old Bailey*, in the Suburbs of the city of *Lon-*
don, on Monday the 17th day of April 1820;—

It is ordered that no publication shall be made of the pro-
 ceedings of this Court, on this or any other day, until the
 whole of the trials of the prisoner *Arthur Thistlewood* and
 the other prisoners included with him in an indictment
 against them, in this Court, for high treason, shall be
 brought to a conclusion.

By the Court.

[ORDER IMPOSING FINE.]

MIDDLESEX.—At the delivery of the King’s gaol of Newgate,
 holden for the county of *Middlesex* (by adjournment) at Jus-
 tice-

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“ of Newgate, which fine had been estreated unto
“ His Majesty’s Exchequer,) and all orders relating
“ thereto”—on either or both of the two following
grounds :—

tice-Hall, in the *Old Bailey*, in the suburbs of the city of *London*, on Friday the 28th day of April 1820;—

On reading the order of this Court, made the 17th day of this instant April, and a certain order of this Court, made on the 25th day of this instant, whereby, on the motion of Mr. Attorney General, and on reading the affidavit of *George Holditch* and *Elijah Litchfield*, and certain exhibits thereunto annexed, it was ordered, that *William Innell Clement*, the printer, publisher, and proprietor of a certain newspaper called the *Observer*, do attend this Court on Friday next, the 28th instant, at the hour of nine in the morning precisely, to answer for unlawfully and contemptuously printing and publishing, in the said newspaper, the trials of *Arthur Thistlewood* and *James Ings*, for high treason, pending the proceedings against *John Thomas Brunt* and others, who were included in the same indictment with the said *Arthur Thistlewood* and *James Ings*, for the same high treasons, contrary to the order of this Court, and to the obstruction of public justice; and on reading the affidavit of *Elijah Litchfield* of the due service of the said last mentioned order on the said *William Innell Clement*; and the said *William Innell Clement* being solemnly called, not appearing; and the offence mentioned in the said last mentioned order being fully proved on oath against the said *William Innell Clement*, IT IS ORDERED, that the said *William Innell Clement* do, for the said offence, pay to our Lord the King a fine of 500*l*.

By the Court.

[ORDER FOR THE APPEARANCE OF THE PARTY, AD RESPONDENDUM.]

MIDDLESEX.—At the delivery of the King’s gaol of Newgate, holden for the county of *Middlesex* (by adjournment) at Justice-

grounds:—first, that the orders were illegal: and, secondly, that the fine imposed was excessive.

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[It was made part of the application, that the foreign Apposer of the Court of Exchequer, might be directed, in the mean time, to suspend his judgment on the said fine, and not further proceed therein.]

The affidavit of *Clement* on which the motion was founded, stated, that he had heard, that on Monday the 17th of April 1820, *Arthur Thistlewood* was put upon his trial at the Justice-Hall in the *Old Bailey*, upon an indictment charging him with the crime of high treason; and that the Lord

Justice-Hall, in the *Old Bailey*, in the suburbs of the city of *London*, on Tuesday the 25th day of April 1820;—

On the motion of Mr. Attorney General, and on reading the affidavits of *George Holdich* and *Elijah Litchfield*, and certain exhibits thereunto annexed, it is ordered, that *William Innell Clement*, the printer, publisher, and proprietor of a certain newspaper called the *Observer*, do attend the Court on Friday next the 28th instant, at the hour of nine in the morning precisely, to answer for unlawfully and contemptuously printing and publishing, in the said newspaper, the trials of *Arthur Thistlewood* and *James Ings* for high treason, pending the proceedings against *John Thomas Brunt* and others, who were included in the said indictment with the said *Arthur Thistlewood* and *James Ings*, for the same high treason, contrary to the order of this Court, and to the obstruction of public justice

By the Court.

THOMAS SHELTON,
Clerk of the said Session
of Gaol Delivery.

Chief

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Chief Justice of His Majesty's Court of King's Bench at Westminster, then being one of the Justices or Commissioners before whom the said *Arthur Thistlewood* was tried, before the commencement of the said trial, made to the persons then assembled in the said Justice-Hall, upon occasion of the said trial, the following statement in terms:—
 “ As there are several persons charged with the
 “ offence of high treason by this indictment, whose
 “ trials are likely to be taken one after another,
 “ I think it necessary strictly to prohibit the pub-
 “ lication of the proceedings of this or any other
 “ day, until the whole of the trials shall be brought
 “ to a conclusion; and it is expected that all
 “ persons, therefore, *will attend to this* ADMONI-
 “ TION*.”

The Deponent further stated, that he had heard and believed that the trial of the said *Arthur Thistlewood* was concluded on Wednesday the 19th day of the said month of April; and that *James Ings* was afterwards, at the same place, tried for and convicted of the same offence, on the 22d—that on the Sunday next (the 23d) following the conclusion of the last mentioned trial, the Deponent did publish in the *Observer*, whereof he was printer, publisher, and proprietor, a fair, true, and impartial account of the proceedings and evidence publicly had and produced in open Court, upon occasion of the said trials—that on Tuesday the 25th of April, the Deponent departed from *Lon-*

* In *Gurney's Account of this Trial*, vol. i. p. 46. the words are, “ will observe this *injunction*.”

don,

don, pursuant to an intention sometime previously formed, and not with a view of avoiding any legal proceedings whatever that might be resorted to against him; and that, after visiting several places in the county of *Kent*, he arrived at *Faversham* on Friday the 28th, where, on the following day, he saw, in a public newspaper, an account of the sentences passed on the prisoners *Thistlewood* and *Ings*, and that he himself had been ordered by the Court to pay 500*l.* to His Majesty, as a fine for a contempt of Court; and that that was the first intimation the Deponent had of any such proceeding having been taken in the Court against him for the alleged offence of publishing the trials—that he immediately left *Faversham*, and arrived in *London* in the evening of Saturday the 29th, and was then, and not before, apprised that a paper writing (the order imposing the fine, which was annexed to the affidavit) had, in the afternoon of Wednesday the 26th, been served at the office of deponent in the *Strand*; and that he was not served with any order of the Court of Gaol-delivery at Newgate, nor was any order, other than and except the said order or paper writing, left for him, or served at his office or dwelling-house.

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The Deponent's servant (who joined in the affidavit) corroborated the statement of the paper having been left at the Deponent *Clement's* office, during his said absence.

It was also sworn by *Clement* in the same affidavit, that the said fine had lately been estreated into
His

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His Majesty's Court of Exchequer, and that the same was claimed by or on the behalf of the Duchy of Lancaster, and that it was intended to issue process thereon against the deponent, his estate and effects; that he had been advised, and believed, that the order of prohibition respecting the publication of the said trials, and the subsequent orders relating to him and the said fine, were contrary to law; and that the said fine so ordered to be paid by him was, in amount, excessive.

Clement's Solicitor stated, in the same affidavit, that he had frequently applied to the Clerk of the session of gaol delivery at Newgate, to inspect and procure a copy of the order of Court referred to in the order [imposing the fine]; and that the Clerk of the session informed him, upon every occasion of such applications, that he could not inspect the order, or have a copy thereof, inasmuch, *as the admonition of the Chief Justice of the King's Bench had not then been drawn up or entered as an order of the Court.*

In support of the application it was first submitted, that this Court had clearly jurisdiction to discharge the fine which had been imposed, now that it was estreated into the Exchequer, if it could be shewn to the satisfaction of the Court, that it had been set on the Defendant arbitrarily and without lawful authority, and that it was an illegal imposition, which could not be justified. On that point, *Sir Thomas Hemilthorpe's case*(a)

(a) 4 Inst. 84.

was cited, in which this Court discharged the party of a fine estreated into the Exchequer, which had been imposed on him by the Lord Chancellor, for not performing a decree in Chancery, on the ground that the Chancellor had no power to assess any such fine. In *Hamond v. Howell*, Recorder of London^(b), the Court said, “if there be error “in the judgment (imposing a fine) it is void, and “therefore the Barons of the Exchequer may refuse to issue process upon it, and the estreats will “be vacated.” Upon the authority of those cases it was stated, that it had been considered the most advisable course to proceed by the present application to this Court, process being expected to be issued upon the estreat, at the instance of the Duchy of *Lancaster*, who claimed a right to the fines imposed by the Court of general Gaol-delivery at the *Old Bailey*.

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It was then contended, that the imposition of the fine could not be supported in point of law: and that it was not justified by the facts of the case; wherefore, this Court having power and jurisdiction, ought, on being satisfied that that were so, to discharge the party. Upon the proposition of the illegality of the fine, the following several objections (in substance) were urged—first, that, no order having been made, and no offence having been in fact committed, no fine ought to have been imposed, if the Court had the power to fine—secondly, that the Court had not power to fine; or, if it had, it could not fine in the manner in which it

(b) 2 Mod. 218.

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had proceeded. It was insisted, that if the Court for the delivery of the King's gaol of Newgate had the power to impose such a fine, in any case, yet under the circumstances of this case, there was no legal foundation for it on the facts; and, for these reasons; because what passed in Court did not, in effect, amount to a judicial order prohibiting the publication; and admitting that the Court had authority to issue such an order—it was not in effect an order; but was expressly, in terms, a mere admonition, and could not be acted on as a mandatory precept, or made the foundation of any penal proceeding, subjecting any one who might disregard it to pecuniary or corporal punishment. It was also urged, that, in point of fact, the order of prohibition was not drawn up, until after the order imposing the fine was made, as appeared from the affidavit of the party.

But, if it were to be taken as an order of the Court, and not the recommendation of a Judge, it was insisted, that it was an order which the Court had no legal authority, and were incompetent, to make. The publication of proceedings in Courts of justice, it was contended, was not an offence. The Courts of Law, in this Country, are necessarily and constitutionally open and public, and accessible to every individual of the community, and the right to communicate publicly what passes there, is the necessary consequence of, and inseparable in reason and common sense from the right to be present in Court. Whatever mischief would result from the former right, must unavoidably be the

the effect of the latter. There was therefore nothing illegal in what the applicant had done.

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On that point—the legality of making public the proceedings of Courts of law, and that, notwithstanding such publication may have the effect of injuring individuals concerned—the case of the *King v. Wright* (c) was cited, as fully establishing the right to publish such proceedings, and recognizing the advantage derived to the public from the general circulation of such publications. The case of *Curry v. Walter* (d) was also cited for the same purpose. In the latter case, the reason on which the legality of such publications is founded is stated to be, because courts of justice are open to all the world; that accessibility had always been considered an inseparable incident from the administration of justice, whereby an advantageous publicity was given to their proceedings, and a greater degree of certainty imparted to the knowledge of the laws themselves, of which qualities it has been said, “*Jura publica certissima sunt humanæ vitæ solatia, infirmorum auxilia, potentum frena* (e).”

If there were any breach of the law in the publication of this trial, it was submitted, that the imposing a fine by the authority of the Court of gaol-delivery, in the manner and under the circumstances of the present case was not the proper or legal mode of punishing it. The proper and

(c) 8 Term Rep. 293.

(e) Cassiod. Var. 180.

(d) 1 Bos. and Pul. 523.

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only legal course would be by indictment, or some other means which would give the party an opportunity of defending himself from the charge in point of fact, or of disputing his liability in point of law. Here, on the contrary, the proceeding was merely summary; the authority assumed was not founded on law—was exercised in the absence of the party—on an affidavit which might be false—himself unheard—and without any power or means of appeal. If the Court of gaol-delivery, as a Court of Record, had authority thus to impose a fine at discretion in such a case, and under such circumstances, so would the Steward of a Court-leet, or any Judge of inferior Courts of record; whereas no Court, however high, was invested by law with such arbitrary authority as to condemn in the absence of the party: *Hawk. Pl. Cr. ch. 27. sect. 111.*

The order imposing the fine in this case, it was insisted, had been preceded by, and was founded on an order which it was equally out of the power and beyond the authority of the Court to make,—an order requiring the personal appearance of the party *ad respondendum*. That order besides had not been personally served, but had been merely left at the printing office of the applicant; so that the whole proceeding was altogether unprecedented in practice, and unauthorized in law. Even in cases of attachments for disobedience of rules of Court, the party must be *personally* served:—*Hawk. Pl. Cr. vol. ii. ch. 22. sect. 37.*

It was admitted, that all Courts had authority
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to punish and repress contempts, the effect of which tended to obstruct and impede them in the performance of their duty of administering the law; but it was contended, that such contempts must necessarily have the effect of actually and literally obstructing and hindering the course of justice, and must be committed *in Court*, so as to render the exercise of such extraordinary power in the Court a matter of necessity, in order to enable the Court to proceed in the discharge of its duty, by instantly repressing or removing it. Even in such cases, if further measures of punishment were to be resorted to, the regular and ordinary proceedings must be adopted, as in all other cases of offences against the laws; for as the Court of gaol-delivery has no power of issuing process of attachment, nor any means of compelling the appearance of a party, it cannot therefore adjudge any punishment but in the common course. In the present instance, however, it was urged, there had been no obstruction or impediment caused, and the account of the trial was not published till the particular trial was concluded: and that at the time when the order imposing the fine was made, the trials of all the prisoners were at an end. In this part of the argument, *Griesley's case* (*f*) was referred to as illustrating the nature and objects of fines, and distinguishing between such as were imposed for contempts, and misdemeanours in and out of Court, and shewing, that in the latter case inquiry is necessary. In *Dean's case* (*g*) it was said, a man might be imprisoned for a contempt in Court, but

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(*f*) 8 Co. Rep. 75.(*g*) Cro. Eliz. 689.

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not for a contempt out of Court: and there a party, who had been imprisoned, was discharged. The case of the *King v. Bushel* (*h*) was also cited to the same point. The statutes of the 25th of *Edward* the 3d, stat. 5. ch. 4., and the 42d *Edward* the 3d, ch. 3. were adverted to, to shew that the legislature had considered that assuming the power of imprisonment, or of putting the subject to answer without indictment or presentment, was illegal. *Lilburne* and *Warton's* case* was also cited as in point.

For these reasons it was urged, that the party was entitled to a rule to shew cause why he should not be discharged of the fine which had been imposed.

The objection on the ground of the excess was abandoned; as it was admitted, that if the Court had the power to fine, the amount must necessarily be discretionary.

RICHARDS, *Chief Baron*.—We are of opinion that there ought not to be a rule to shew cause in this case. The same question has been already very fully argued in the Court of King's Bench (*i*), and those arguments on both sides are in the possession of us all. On that occasion the Court of King's Bench, sanctioning by their authority the order of the Court of general Gaol-delivery, re-

(*h*) Vaughan's Rep. 136.

* Rushw. Hist. Coll. Part 2. p. 463.

(*i*) The *King v. Clements*, 4 Barnew. and Ald. 218.

fused

fused to relieve you. You then, as you do now, exercised your right to raise objections to the payment of this fine: and if we now thought that there was any thing in those objections on which we could fairly entertain any doubt, we should certainly, of our own authority, grant the rule; but having given them due attention and consideration, we really see no ground for our interference.

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I shall not, on the present occasion, say any thing on the general question of the legality of publishing all the proceedings which take place in Courts of Justice: that general doctrine must be taken with very considerable restrictions; because undoubtedly there may be speeches of such a nature, and delivered under such circumstances, even in Courts of Justice, as that the publication of them would be libellous. Such would be those speeches which are sometimes made by Counsel, agreeably to their instructions, which, however, are in truth wholly unfounded in fact. In saying thus much, however, I mean nothing more at present than to reserve to myself a right, whenever occasion shall occur, to maintain that there does not exist a general right to publish, with impunity, whatever passes in a Court of Justice, merely on the ground that it is part of the proceedings which may have taken place there on any particular occasion.

I was present at the *Old Bailey* on the trial, and it is material that we should recollect what the occasion which gave rise to this publication was. Several persons were put separately on their trial for

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high treason, and under such circumstances of atrocity, as that the blood runs cold at the recollection of them; so ferocious were the means devised for the perpetration of the intended crime of which they had planned the execution, and were devising the means of committing. The prisoners being to be tried separately, can it be doubted, as my Brother *Graham* has well observed, that the making public the trial of any one of them, before the others came on, was not a publication of the *whole* of the proceedings? It was certainly a most wickedly partial publication. The interest which the public at large had in the proceedings, was certainly very great and considerable, but that of the prisoners at the bar was prodigiously more so. In this case, great regard must be had to the magnitude of the occasion; and, under the circumstances, I consider the publication of the trial of one of the prisoners, before the rest had been tried, a cruel, wicked, and atrocious libel; because it was an offence against the public, and more particularly against the unfortunate persons about to be placed on their trial.

As to the mode in which the Lord Chief Justice expressed himself, that was entirely matter of delicacy to the persons attending to take notes of what passed. There was not one publisher in this great town who had not honour and integrity enough to obey the injunction of the Court, with the single exception of this person. He did publish an account of the early trials on the first opportunity, and the mischievous consequences were

were immense. Most assuredly it was a complete and wicked contempt in him to do so. The case was clearly made out against him on affidavits. The Court, however, in tenderness to him, were unwilling to proceed to pronounce any sentence, until they had given him an opportunity of being heard; yet we are told that the sentence was pronounced in his absence, and after the trials were over. But did any one appear in his behalf on the occasion, and apply to the Court that he might have an opportunity of being heard, or give any reason why the sentence should not be pronounced? The publication was a gross and wretchedly wicked contempt, and the Court most properly fined him. The fine was not proportioned to the actual profits which he made in consequence of his iniquitous conduct, and that is a complete answer to any objection made on the ground of the fine being excessive in amount.

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As, therefore, the publication cannot but be considered as a direct contempt, tending to obstruct and impede the due administration of justice, necessarily having the effect of prejudicing the case of the other prisoners; and the fine was fitly imposed, it is impossible for us to hesitate a moment in refusing the rule which has been applied for.

GRAHAM, *Baron*.—This matter has been brought very elaborately before the Court, and without affecting to remember all the cases, I consider myself proceeding on very safe grounds in concurring in the refusal of a rule.

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I say nothing on the topics which have been urged of the mischief of bringing unfounded charges against Englishmen, and disregarding the liberty of the subject; and I think that the best friends of such rights are always to be found amongst those who say the least about them. In this case such topics do not at all apply.

Fair candid reports of proceedings at law will doubtless be always upheld; and I should be among the readiest to say, that the Courts ought to protect such reports from the danger of prosecutions for libel; but the case is very different when a partial account is furnished, without any of the matters given in answer appearing also, to qualify the statements. I mean by a partial account, not merely, as I was considered to mean, an account biassed by affection towards one party, but literally partial, as where a part only of the proceedings are published; and not merely where the talents of the writer are employed to fabricate evidence, and misrepresent what passed. In this case, the account was in fact but partial, till the whole was concluded.

If we call this order of the Court an order, or an admonition, or a notice, the object of it was most proper, and the best reasons are to be found for it, in the necessity of such a course for ensuring fair administration of law and justice. All who were at that time in a situation to employ those formidable instruments of good and evil—the public pens—except this individual alone, were found to have abstained from a similar breach of the order.

der. The power of fining was in this case exercised *ex necessitate*, not that there was a physical necessity for the exercise of it, as in the case of immediate contempt in the presence of the Court, or by the actual disturbance of its proceedings, but by conduct which was calculated to produce much mischief, and actually to disturb, by its effects, the even course of justice. It was therefore most properly and seasonably exercised by those who had at that time the care of the interests of the public, and whose duty it was to protect its most valuable privilege,—the fair administration of the law—by this attempt to prevent the prejudicial consequence of such conduct; and surely the prevention of what might have a tendency to produce a perversion of justice, is the same thing in effect as the removal of an obstruction to the proceedings of the Court. If, then, *ex necessitate justitiæ*, the Courts have the power of removing obstacles, and otherwise protecting the full administration of justice, they must consequently have the means of enforcing it, and with a promptitude calculated to meet the exigency of the particular case, and to crush the immediate evil.

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The very urgency of every such occasion fully explains the reason why the Court have no formal process to employ for such a purpose. The common and ordinary mode of proceeding is, to order a person guilty of a riot in Court to be brought up before the Judge, to be committed; or, if out of Court, to be brought in for that purpose. If a Judge at *Nisi Prius*, whose authority is not equal to

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to that of the Judges under such a commission as this, should order, as they frequently do, for the wisest ends, that the witnesses on both sides should leave the Court, and one of them, with the pertinacity of the present day, should insist on a right to be present, as the privilege of a British subject, can there be any doubt that the Court would be authorised to fine or imprison him for his contempt? Here, an order was made by the Court, the observance of which was absolutely necessary for the purposes of justice, and the person now applying was fined for not obeying it, after having neglected to attend another order, made for the purpose of giving him an opportunity of urging whatever he might have to allege in his behalf. Yet he complains of not having been heard. Whose fault was it? He states, that when the order was served he was in the country, but he does not condescend to say for what reason he was absent, or why he should, just at that time, leave the care of his business wholly to his servants. He however was clearly responsible for the acts of the people of his office. The answer, however, has been already given to that ground of objection. He might have applied to the Court, stating that he had been taken by surprise, to be allowed an opportunity of being still heard; but he did not choose to do so, and altogether refused to appear, and state any thing in his own behalf.

If the Court has not the power to do what has been done in this case, the administration of justice is in great danger. I am clearly of opinion that
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the Court had the power to do what they have done, and that this person had full opportunity afforded him of being heard, if he should have thought proper to have offered himself to the notice of the Court with any thing that he might have to say in his favour. Upon the whole I see no reason for any further discussion of this matter.

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WOOD, *Baron*. I am clearly of opinion that there is no ground whatever for calling upon this Court to remit the fine which has been imposed. It is incident to every superior Court of Justice to have power to fine and imprison for contempt. An offender may also be indicted, but it is not necessary to have recourse to so circuitous a mode of proceeding, where this summary authority is more convenient and effectual. This power is inherent in the superior Courts of record, *per legem terræ*, and as much so as any of those which they exercise by virtue of their jurisdiction in enforcing judgments founded on cases determined by means of a jury. That at once disposes of the question which has been made of their jurisdiction.

Then it is said that there was no ground in this case for imposing the fine. [Having stated the occasion.] Before the trial of the prisoners, the Court desired that the proceedings of each day's trial should not be made public, till all the prisoners should have been tried; in order to obviate all prejudice which might arise, and to shut out from the public mind undue influence. There can be no doubt that that Court, then sitting at the *Old Bailey*, had a right to make such an order for such a purpose ;

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purpose; and, consequently, if it were infringed, they might fine and imprison for contempt. The Court, it is plain, thought it necessary, for the sake of the pure administration of justice, that the proceedings should not be made public till they were closed: and with very good reason; because the case for the Crown, and the evidence given on the first trial, might thus come to the knowledge of the other prisoners who were yet to be tried; and when they had been made aware of the circumstances intended to be proved against them, they might have got up a defence purposely to meet the case for the prosecution, and may have produced false witnesses in support of it.

Now *Clement* has admitted, that he, being aware of the prohibition, notwithstanding published an account of the proceedings pending the trial, and for that contempt the Court, during the same sessions, fined him for so doing in this sum of 500*l*.

I am of opinion that he was guilty of an absolute contempt of the Court in doing so, and therefore had incurred the penalty which the Court imposed on him. Where the witnesses are ordered out of Court, in order to be examined apart, as they may be, shall it be permitted to any man in such a case to say, that as he had a right to be present, and to hear what passed, he had therefore also a right to communicate what he had heard, in defiance and frustration of the order of the Court? If so, having heard what the witnesses who had been examined had stated, he would have had an equal right to
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go to the witnesses who were out of Court under the order, and tell them of all that had been said by the witnesses who had been previously examined.

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Then it is said, that the proper and only course in such a case is, to proceed by indictment. That would be a salvo for all contempts; for a Judge, if he could not take a much more summary course, but were obliged to wait the result of an indictment before he could enforce his authority, would be a mere cipher on the bench. In some cases an indictment may be a very proper mode of proceeding with a view to more remote consequences, as where the offender runs away. In that case it might be necessary to indict him, in order to outlaw him; but that affords no argument against the existence of the power of the Court to impose a fine under circumstances in a summary manner. I am of opinion that there are no grounds for the present motion.

GARROW, Baron. This motion being made by one of the Counsel for the applicant in the Court of King's Bench, it has been pressed with all the advantage of his having heard the arguments on both sides in that Court, when the legality of this fine was discussed at length there. It is indeed a matter of such immense importance, as connected with the pure administration of justice, that I shall make no apology for considering it at some length, for I am quite sure that the Courts of Law, instead of being a blessing to the people of this country, would be worse than nuisances, if they had no power to support their authority by effectual summary

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mary measures. The right of the publication of trials has always been exercised by the Courts, and they have never hesitated to use their power of exclusion, in fit cases, of all persons except those whose duty compelled them to endure the misery of being present. If they have no such authority, newspapers must be banished from all families, for trials, attended with the most indecent and disgusting details, would be constantly found there. I allude more particularly to those of too revolting a nature to be mentioned. I remember a great Judge, who having in his notebook collected the facts of a most offensive trial, calling the Sheriff to him, and desiring him to see that the contaminated leaves were burnt. That was done, and no person was found of sufficient infamy to be desirous of making money by the publication of it.

Upon the occasion on which this fine was imposed, it is well known that there were several persons to be put on trial, for high treason and other crimes. As soon as the Jury were sworn on the first trial, the Lord Chief Justice prohibited the publication of the proceedings, in the following terms :—“ As there are several persons charged by
“ this indictment, whose trials may come on one
“ after another, the Court thinks it necessary, for
“ the furtherance of justice, strictly to prohibit the
“ publication of the proceedings on this or any
“ other trial, until all the trials shall be gone
“ through. It is highly necessary, for the pur-
“ poses of justice, that the public mind, or the
“ minds of those who may be to serve on trials
“ hereafter,

“ hereafter, may not be influenced by publications
 “ of any thing which takes place on the present
 “ trial. We hope all persons will observe this in-
 “ junction.” Now that prohibition was not made
 for the purpose of keeping back any information
 from the public, nor for withholding altogether any
 account of what should pass upon the trial. The
 prohibition did not extend to taking notes of what
 passed, nor to any future publication of the trial on
 some future day, when the pending trials should be
 concluded, and no mischief could consequently
 arise to the prisoners from the publication. This
 was not, therefore, any thing like a proceeding with
 closed doors : the whole amounted only to a tem-
 porary suspension. Of the necessity of such a pro-
 hibition, for the furtherance of justice and mercy,
 every one must be convinced who sees the object
 of it. The necessity of keeping the testimony of
 witnesses concealed from parties, and from each
 other, is sometimes of the utmost consequence in
 the administration of justice, particularly on such
 trials as these where the same evidence must ne-
 cessarily be given in each case almost *verbatim*, and
 of which advantage may be taken, either to the
 undue favour or prejudice of the prisoner. As my
 Brother *Wood* has already observed, what is to be-
 come of the effects of the useful practice of sending
 the other witnesses out of Court whilst those first
 called are under examination, if it were permitted
 to any one to communicate the evidence given by
 them? The witnesses may be afterwards assembled,
 and practised together in the delivery of the testi-
 mony to be given by them, as I once remember
 proved

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proved to have been done, by a solicitor of great but infamous name in his time ; and that not only in their examination, but in their cross-examination.

His Lordship then stated the course of the several trials *, observing, that the trials of the prisoners joined in the same indictment had all been concluded, except one, on Friday ;—that on the following Sunday the account was published in his paper by *Clement*, whilst there yet remained one (*Brunt*) to be tried on that indictment, and two others upon another, who joined in their challenges ;—and that his was the only paper in which the account had been published, all the other papers in the kingdom preferring the observance of an honourable propriety, by submitting to the prohibition of the Court, to the immediate pecuniary profit which might arise from infringing it. [His Lordship also adverted to the motion made thereupon by the Attorney-General, and the observations which fell from the Lord Chief Baron, on that occasion, as to the serious nature of the accusation. He then stated the grounds of the application as renewed afterwards, and added] I cannot do better than conclude what I have thought fit to say, in support of the opinion which I have formed on this case, in the words of the Lord Chief Justice, which is a complete summary of the reasons and principles on which the Court, as I think, rightly proceeded. I was excused from attending on that day, in consequence of indisposition, or I should have concurred most fully in all that appears

* See Gurney's Account, vol. ii. p. 306-8., 653, 4, 5.

to have been said by the Lord Chief Justice. "No person (says his Lordship) can rationally doubt that the publication which has been complained of, manifestly tended to obstruct the course of public justice. It is extremely desirable that all the gentlemen who may be assembled as jurymen to serve on any trial, should come with minds as little influenced as possible by any thing that may have taken place on any former trial." It was requested by the learned Counsel for the prisoners, that the witnesses to be examined on the part of the Crown at the first trial, should be examined separately, that no one should know what another had said; but by the publication of what had been said on any one of the trials, the persons summoned as witnesses were enabled to obtain that knowledge previously to a future trial, which it was the proper desire of those who were entrusted with the interests of the prisoners to prevent their obtaining. The mischievous tendency of such publications cannot, as I have already said, be doubted by any mind. The Court thought it right, before the first trial was begun, to express in the strongest terms its opinion as to the impropriety of any such publication, and to admonish those who were concerned in the publication of the daily or weekly papers, to abstain from such insertion. To that admonition it seems the editors and publishers of all the daily papers, and, as far as I am informed, of all the weekly papers, yielded a due and respectful obedience, with the exception of the single person whose case has been now brought before us. That person, therefore, must have been led to this by a desire of gaining to himself extraordinary

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ordinary profits, by becoming the first who was to gratify the public curiosity by the publication of these trials; a desire to engross the whole of that profit to himself, in contempt of the admonition of the Court, in contempt of the general rules and principles of law, and to the prejudice of all persons concerned in the public newspapers, who had, as I observed before, yielded obedience to the law, and to the admonition of the Court.

From one expression of the Lord Chief Justice, it has been ingeniously attempted to contend, that this was not in effect an order of the Court, but a mere admonitory recommendation of the Judge. But there is no pretence for so putting it, because there was an actual order to that effect made and entered by the Court. His Lordship then proceeds to state, that this person, by withdrawing himself, had avoided the mode of punishment by imprisonment, which the Court would have inflicted on him if he had been present, and pronounces the order of the Court against him for the payment of this fine of 500*l*. I entirely concur in all that proceeded from my Lord Chief Justice on that occasion, and I cannot for a moment entertain a doubt of the power of the Court to imprison or fine in a case of this sort: nor have I heard any thing advanced to-day which should induce this Court to interfere in any way to intercept the levying of the fine which has been imposed.

Per Curiam

Rule refused.

FARLOW

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Monday,
10th June.

FARLOW, on behalf of himself and the other Creditors of a Testator, v. WILSON and Another, Executors, &c.

JERVIS, for the Defendant *Wilson*, moved on this bill, filed by creditors of a testator for an account against his executors, that *Richard Hill*, a creditor of the defendant's testator, might be restrained from proceeding further in the action at law commenced by him against the defendant, on an affidavit stating that the bill was filed in Easter Term, 1821, and the usual decree for a reference to take an account was obtained in February last, and an advertisement inserted in the *Gazette* of the 4th of May, for creditors to come in and prove their debts; that on the 6th of May, *Hill* brought an action against the Defendant in the Court of Common Pleas, and on the 25th the Defendant delivered a plea, and served the Plaintiff, in such action, with notice of the suit in Equity in this Court, and of the decree and reference; but that he had, notwithstanding, proceeded in the action, and given notice of trial. An order *Nisi* having been granted.

Injunction granted to restrain a Plaintiff from proceeding in an action at law, a decree of reference to take an account having been obtained on a creditor's bill against executors before action brought.

The Defendant not having apprised the Plaintiff of the decree at the time of being served with process, and not having given notice of such decree, or of this application, till after notice of trial, was ordered to pay to the Plaintiff, as the terms on which the injunction was granted, all the costs of the proceedings at law, up to the time of the service of notice of the decree, and the costs of the motion for the injunction.

Moore, for the Plaintiff in the action at law, now shewed cause on an affidavit of *Hill*, stating, that when the writ was served on *Wilson* he endorsed thereon an undertaking to appear, and did not at that time inform the Deponent, the Plaintiff at law,

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law, of the Equity suit, of which he the Deponent was entirely ignorant; that on the 11th of *May* the Defendant took out a summons for particulars, and three orders for time to plead, and pleaded the general issue and *plene administravit*, on which first plea the Deponent joined issue, and gave notice of trial for the first sittings in this Term; that the Deponent meant to have proceeded to trial accordingly, but that on the 5th of *June* he received notice of the present motion, and he thereupon continued his notice of trial for the second sittings in this Term.

The Deponent then submitted, that the Defendant had, by such plea, rendered himself personally liable for the costs of the action, and that on payment thereof he was ready to abide the order of the Court, and concluded by swearing to merits.

The Court granted the injunction, on the terms of the Defendant paying all the costs at law which had been incurred up to the time of the service of notice of the decree, and the costs of this motion.

Ordered.

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Wednesday,
12th June.

LITTLEWOOD v. CALDWELL.

FLATHER moved for an injunction in this case to restrain the Defendant from further interfering in the partnership business, receiving debts, or drawing bills &c. and for an account and dissolution of the partnership, on a bill filed for that purpose, supported by an affidavit made by the Plaintiff, stating, that he and the Defendant had been partners from the year 1805 till the time of filing the bill, and that no deed or articles of copartnership had ever been executed between them, and no period fixed for the duration of the partnership; that the Plaintiff had invested in the concern a capital of 3,103*l.* while that invested by the Defendant amounted to 581*l.* only; that since *July* 1816, the account had never been balanced; that in *February* 1822, the Plaintiff gave the Defendant notice in writing that the partnership should cease and be dissolved in one month from that time; that after that notice, they agreed that an account of stock, and the balance of the partnership accounts, should be taken by two persons named on either side; that that was done, and that it thereupon appeared that the Plaintiff's share in the capital and profits of the concern amounted to 2,495*l.* and that the Defendant had drawn out of the concern his own share, and 128*l.* beyond, which he had applied

Quare,— Whether a partnership for an indefinite time, without deed, can be dissolved on notice by either party.

Where a Defendant in a suit, founded on charges of misconduct, for an account and a dissolution of the partnership and for an injunction to restrain him from receiving debts, drawing bills &c. or further interfering in the partnership concern, denied or explained facts of appropriation to his own use of debts received by him from persons indebted to the concern, and alleged that he could not put in his answer to the bill because the Plaintiff had possessed himself of the partnership books, and carried them away from the partnership premises, the Court would not even grant

the injunction, on the ground of the Plaintiff having acted improperly.

In refusing such an application, however, the Court did so expressly without prejudice to any future application.

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applied to his own use; and that he had since clandestinely received several sums of money due from debtors to the concern, which he had not entered in the partnership books, but had applied to his own use, and was therefore considerably indebted to the concern.

The Defendant also filed an affidavit stating, that the accounts so taken were not conclusive, but were to be subject to examination; that the Plaintiff had taken and carried away the partnership books from the premises where the business was carried on, and had refused the Defendant access to them; and that the Defendant had received money due from persons indebted to the concern, but that he had applied it to the payment of debts due from themselves, and not to his own use, and that those sums had not been entered in the partnership books by him, because the Plaintiff had removed them; and that he was for the same reason unable to prepare and put in his answer.

In support of the motion it was urged, that the partnership must be considered as dissolved by the effect of the notice; for where partners are not under an express agreement that the partnership shall continue for any precise duration of time, it may be dissolved on notice at any time, on the accounts between them being wound up, and the balance fairly struck—*Peacock v. Peacock (a)*, *Featherstonhaugh v. Fenwick (b)*. It was there-

(a) 16 Ves. 49.

(b) 17 Ves. 396.

fore submitted, that under the circumstances disclosed in the affidavits, the Plaintiff was entitled to the injunction prayed.

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Cooper, for the Defendant, contended, that the Plaintiff was not, under the circumstances of this case, in a condition to ask for the interference of the Court as prayed.

RICHARDS, Lord Chief Baron.—We cannot at present, in this state of the case, grant the injunction. Whether we ought to dissolve the partnership, under the circumstances before us, is a very considerable question. [His Lordship stated the circumstances from the affidavits.] On one side, a misapplication of money received from persons indebted to the concern is charged, on the other hand that is denied, and the sums accounted for. The Defendant also states in his affidavit, that the Plaintiff took away the partnership books, and that is not denied. That was certainly committing an unwarrantable outrage on the partnership property, to which he had no more right than the Defendant, and it deprives the Plaintiff of any claim to the favour of the Court. Under the circumstances, therefore, we refuse the motion, without prejudice, however, to any future application which may hereafter be thought advisable to make.

The rest of the Court concurred.

Injunction refused.

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IN THE EXCHEQUER CHAMBER.

[ERROR FROM THE KING'S BENCH.]

DILLON, Esq. v. PARKER, Bart.

Friday,
14th June.

A party bringing a writ of error, and thus removing the record before he has procured the Judge's seal to a bill of exceptions tendered by him at the trial, on the rejection of his evidence, waves, by so doing, the bill of exceptions allowed by the Judge.

CHITTY moved, on the part of the Plaintiff in error, pursuant to notice, for a rule to shew cause why the Defendant in error should not be compelled to settle a bill of exceptions, allowed on the trial of this cause in the Court below, in order that the learned Judge who tried the cause might seal the bill of exceptions, that it might be carried over to this Court, and why the transcript should not be amended by having such bill of exceptions annexed thereto.

Semble, that if there had been no waiver, the Court of Error can not order a party to settle a bill of exceptions, in order that it might be sealed and appended to the transcript of the record by amendment.

Qⁿ. Within what time a party ought to procure the Judge's seal to a bill of exceptions?

The action below was trespass for breaking and entering a messuage &c. of the Plaintiff. The Defendant pleaded, Not guilty, and Leave and licence; and the Plaintiff replied, taking issue, and *sua injuria*. The cause was tried before Mr. Justice *Richardson*, at the *Worcester* Summer Assizes, in July 1820. The jury found a verdict for the Plaintiff, with damages on both issues, on which judgment was entered up in the following Michaelmas Term.

The Defendant below then brought a writ of error, and he assigned, amongst other errors, that
the

the Judge had refused to permit him, on the trial of the first issue, to give in evidence that he was, at the periods mentioned in the second and third counts of the declaration, in possession of the premises as owner thereof, referring to a bill of exceptions tendered by him on the trial at *Nisi prius* on that ground. The bill of exceptions not having been brought over with the transcript of the record, a summons was taken out on the 3d of *May*, requiring the Plaintiff's attorney to attend Mr. Justice *Richardson*, to shew cause why the bill of exceptions tendered by the Defendant on the trial should not be finally settled from the Judge's notes of the evidence. The learned Judge, upon the hearing of the matter upon the summons, refused to determine the point of practice as to the time within which a bill of exceptions should be delivered over, and suggested an application to the Court, intimating that he considered the Defendant was too late, not having called upon him till the last term, without doing something more.

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Taunton opposed the application in the first instance. He urged that the object of the motion was obviously merely delay, and submitted that the Court should not, by establishing such a precedent, furnish to unsuccessful defendants such means of procrastinating to plaintiffs the fruit of their verdict by so easy a device as this. There must necessarily, he urged, be some limited time within which the Judge's seal to a bill of exceptions ought to be procured; or if it were in the discretion of the Court, this was a case in which, after such
 gross

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gross laches, this motion ought to be refused, even if this Court had the power to do what was now asked of them, to order a party to settle a bill of exceptions, and annex it to the record after errors assigned. He adverted to the statute, and the case of *Wright v. Sharp (a)*.

PARK and BURROUGH, *Justices*, observed, that it was impossible for *this* Court to order what was required of it by this application, and that the proper course would be to apply to the Court of King's Bench, who might perhaps make such an order, and then the bill of exceptions might be brought up by an allegation of diminution.

WOOD, *Baron*.—I am clearly of opinion that it is now too late for the party to apply for the Judge's seal to the bill of exceptions. Having brought a writ of error, and removed the record, his bill of exceptions is in point of law entirely waved. He ought not to have brought this writ of error until he had got his bill of exceptions sealed, if he had meant to have had it appended to the transcript of the record.

The whole Court entertaining the same opinion, the application was refused.

Motion Refused,

With Costs.

(a) Salk. 388.

BOWYER

1832.

BOWYER v. PRITCHARD Clerk, HERIOT, SMITH,
BIRCHAM, REED, and MAUND.

Saturday,
15th June.

THE Plaintiff, by this bill, prayed that the Defendants might set forth their several titles, claims, and interests in and to the rent of 37*l.* for the tithes and premises in the bill mentioned; and that they *might be decreed to interplead* together touching the said rent for the tithes and premises demised to the Plaintiff, and that he might be at liberty to pay the rent now due, and hereafter to accrue due, into Court for the benefit of such of the Defendants as may be declared to be entitled thereto, subject to further order; and that the Defendants might be restrained from proceeding in or prosecuting any actions at law against him for or in respect of such rent.

The statement in the bill was, that the Defendant Pritchard—being entitled, as Rector of *Walton-on-the-Hill*, in which parish the Plaintiff occupied lands

An occupier of lands took a lease of the tithes, due from himself to a rector, at a rent reserved. The rent was afterwards assigned by the rector to another person who claimed to be paid the arrears. The lessee having also received notice of a further claim from grantees of annuities (previously charged on the tithes by the rector), who had, as such grantees, subsequently to the title of the rector's assignee, sued out a *fiery facias de bonis ecclesiasticis*, against the rector, on a

judgment obtained by them on their securities, filed a bill of interpleader against all the parties, and obtained injunctions on paying the rent due from him into Court. On the answers of the Defendants coming in, the priority of the several titles of the claimants being thereby clearly set out, and the rector disclaiming, the Court dissolved the injunctions—holding, that in such a case they could not restrain the party who was shewn to have a preferable title, from proceeding to enforce it: or to decree that the parties should interplead in a case where the priority of right was so distinctly set forth by the answers.

If the case be not such as will support a bill of interpleader, the defendants should demur.

Such a lease and assignment of part of the rector's ecclesiastical property, were held to be good: and not to be affected by an execution sued out against the rector, after the rent had been assigned.

In an interpleading suit, one of the defendants' answers may be read against the others.

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lands to the tithes arising therein—by indenture of the 14th of *April* 1820, demised to the Plaintiff, his heirs, &c., all those the several tithes of corn, grain, and hay, and other great or rectorial and small or vicarial tithes and dues, &c. whatsoever, which should arise upon the Plaintiff's lands during the life of *Pritchard*, for the term of his natural life, at a rent of 37*l.* a-year, with the usual covenants on both sides : that the Defendants, *Heriot*, *Smith*, and *Bircham*, on the 26th of *June* 1821, served upon the Plaintiff a written notice, signed by *Bircham*, stating, that by an indenture dated the 1st of *June* 1816, between *Pritchard*, of the first part, the Defendant *Heriot* of the second part, and *William Moore* of the third part, *Pritchard*, for the consideration therein mentioned, granted to *Heriot* an annuity of 50*l.*, chargeable upon the rectory of *Walton-upon-the-Hill*, and all the messuages or tenements, glebe lands, tithes, &c. for the term of 99 years, if *Pritchard* should so long live; and by the same indenture, *Pritchard* demised to *Moore*, his executors, &c., all that the rectory, and all glebe lands, &c., tithes, &c., for the term of 100 years, if *Pritchard* should so long live, for securing payment of the annuity : that *Moore* died in *November* 1816, leaving the Defendant *Bircham* his sole executor. The notice also stated the grant of another annuity of 100*l.* to the Defendant *Smith*, by indenture of the 3d of *June* 1819, secured by a similar demise to *Bircham*. It then proceeded to apprise the plaintiff that he would be required during his occupancy of the lands, tithes, &c., on which the annuities were charged, as
owner,

owner, lessee, or tenant, to pay to him (*Bircham*), his executors, &c., the rents, tithes, &c., then due, or the compositions or payments to be made by him in lieu thereof, or which should become due, &c.; and that in default of such payment, he, *Bircham*, should pursue his remedy by ejectment or otherwise.

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The bill also stated, that *Pritchard* admitted such indentures, and that *Bircham* was the representative of *William Moore*; but the Plaintiff alleged and insisted that the deeds were not valid, on the ground of usury: that the Defendant *Maund* had informed the Plaintiff, and *Pritchard* had admitted, that subsequently to the date and execution of the said indenture of lease of *April* 1820, but previously to *August* 1821, *Pritchard*, for some considerable pecuniary consideration, assigned to *Maund* the said yearly rent of 37*l.* It was also alleged, that there was then due from the Plaintiff under the lease, the rent for the year which ended on the 29th of *September* 1821, which, after certain deductions, amounted to 31*l.* 10*s.*, and that such rent was claimed from him to be paid to them by each of the three parties defendant, by *Pritchard*, by *Maund*, and by *Heriot, Smith* and *Bircham*, each of whom had given the Plaintiff notice not to pay the rent to the others, and had commenced, or were about to commence, actions against him for the recovery thereof: that *Reed* and *Bircham* had, before the 9th of *May* 1821, recovered judgment against *Pritchard* for 4,500*l.* and costs, and had thereupon issued a writ of *fieri facias de bonis ecclesiasticis*

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clesiasticis against *Pritchard* as rector, directed to his diocesan, who had sequestered the fruits, tithes, and profits of the rectory, and appointed *Bircham* and *Reed* sequestrators, in the usual manner : that under such judgment, execution, and sequestration, *Bircham* and *Reed* claimed the rent due from Plaintiff. The Bill concluded in the usual manner, stating that the Plaintiff was ready and willing to pay the rent to the persons to whom it was due, but that he could not safely pay it, by reason of the conflicting claims; praying, &c.

Heriot, Smith, Bircham, and Reed, put in a joint and several answer, and thereby insisted, that if *Pritchard* had granted to the Plaintiff the lease of 14th April 1820, such lease was void as against them, claiming, as they did, under the said indentures, and that the Plaintiff was bound, from the date of the notice, to pay them the full value of the titheable matters produced upon the lands occupied by him within the rectory, until the 26th of June 1821, in part payment of the annuities granted by *Pritchard* : and that he was bound in future to render to Defendants *Heriot* and *Smith* the tithes in kind, or the full value. And they stated, that they did not claim from the Plaintiff or insist on his paying to them 37*l.*, or any other sum, as being rent, as mentioned in the bill, unless the Court should be of opinion that the lease therein mentioned to have been granted by *Pritchard* to the Plaintiff was valid as against *Heriot* and *Smith*; and in that case the Defendants *Heriot* and *Smith* claimed to be entitled to the rent
 then

then due and in arrear under such lease, in part payment and satisfaction of their annuities, and the future rent to accrue due under such lease, as incumbrancers upon the said rectory. They alleged, that *Bircham* and *Reed*, in Hilary Term, 1821, recovered judgment against *Pritchard*, and that execution was issued out thereon on the 9th of *May* 1821, and that on the 22d *Bircham* was appointed sequestrator, on behalf of himself and *Reed*. The same Defendants, in conclusion, submitted, that the Plaintiff was not entitled to call upon them to interplead touching the rent reserved by the lease, and that the Plaintiff had not by his bill stated a case of interpleader against them, claiming under the indentures of 1816 and 1819—insisting on the benefit of such objection, as if they had in that respect demurred to the bill.

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The Defendant *Maund* afterwards put in his answer, stating, that he had, by indenture dated the 4th of *May* 1820, reciting the said indenture of 14th *April*, agreed with *Pritchard* for the absolute assignment of the said rent of 37*l.*, and all his interest therein, for the sum of 240*l.*, and for that consideration *Pritchard* thereby assigned the said rent to him for the life of *Pritchard*, with a power reserved for the re-purchase thereof at the end of five years: that he paid *Pritchard* the whole of the said consideration-money, and that a few days after the execution of the indenture, he caused a letter to be sent to the Plaintiff, containing notice of the substance or effect of such indenture, and required him to pay him the said rent: that the Plaintiff

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Plaintiff had accordingly paid the year's rent, which became due on the 29th of *September* 1820. The Defendant also alleged that he had no notice at any time before, or for several months subsequent to the 4th *May* 1820, or reason to suspect that the rectory was subject to any grant or charges. And he submitted and insisted, that under the circumstances he was entitled to have and receive the said rent from the Plaintiff, and that he ought not to be restrained by the injunction of the Court from such legal steps and remedies as he might be advised to take, in order to compel the Plaintiff to pay it.

The Defendant *Maund* alleged fraud on the part of the annuitants in several respects, and insisted that the deeds on which they claimed were void. He also stated, that he did not know or believe that *Pritchard* had claimed from the Plaintiff the rent due at Michaelmas last under the lease : and, denying all knowledge of the fact, whether the other Defendants claimed the rent from Plaintiff, he admitted that he claimed the whole, as assignee of *Pritchard*. He further stated, that he did not believe that *Pritchard* had given notice to the Plaintiff not to pay the rent to *Smith* and *Bircham*, or that *Pritchard* had commenced or intended to commence any action against the Plaintiff for the rent due : that since the date of the notice by *Bircham*, the Plaintiff had repeatedly promised to pay the present arrear of such rent to him, the Defendant *Maund*, and that not having done so he, the Defendant, did intend to commence such
action

action as he might be advised in order to compel the payment.

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The Defendant concluded by denying that, by reason of the circumstances, the Plaintiff was unable safely and properly to pay the rent due, and that the Plaintiff had made any case by his bill which entitled him to call upon the parties defendant thereto to interplead, claiming the same benefit as if the Defendant had demurred to the bill.

The Defendant *Pritchard*, by his answer, disclaimed all interest in the rent since the 4th May, 1820.

The Plaintiff obtained an injunction, on paying into Court the year's rent due at Michaelmas 1821. That injunction was afterwards dissolved as against *Bircham* and *Reed*, on their answer being filed, and the common order *nisi* was obtained for dissolving the injunction as against *Maund* and *Pritchard*. On the 8th of June notice was given to the Plaintiff, that it would be moved to make that order absolute. The Plaintiff gave notice on the 10th, of a motion to revive the injunction as against *Bircham* and *Reed*, and of shewing cause against the order *nisi* at the same time.

The motion for making absolute the order to dissolve the injunction against *Maund*, now came on.

Agar and *Knight* appeared for the Plaintiff: and

Martin,

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Martin, Barber, and Wakefield, for the several Defendants.

Martin having applied to make the order *nisi* absolute,

Agar and *Knight*, on the part of the Plaintiff, submitted, that this was a proper case, on the facts, for a bill of interpleader; and that the objection that this was a case where a tenant called on his landlord to interplead, did not apply to this, because the question was raised by the act of the landlord subsequent to the lease—*Cowtan v. Williams* (a).

They also submitted, that the assignment was void in this case, as *Pritchard* had no right to assign the rent, and that alone would be a good reason for the Plaintiff's coming here for protection against the vexation of having to discuss a doubtful claim.

[The Counsel for the Plaintiff being about to read statements out of one of the answers, in support of their opposition to the order, it was objected, that as the several Defendants claimed under different interests, they were not bound by the answers of the others; but

The Court determined that this must be taken to be an interpleading bill, because it had not been

demurred to, and that it was therefore competent to the Plaintiff to read passages out of any of the answers against either of the Defendants.]

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It was, on the whole case, contended on the part of the Plaintiff, that as this was a case where the payment sought from the Plaintiff could not be safely made, he had a right to call on the parties claiming it to interplead, or at least to have an injunction. The principle on the doctrine of interpleader, as laid down in the case of *Angell v. Hadden (b)*, they urged, carried the right very far, as it was determined there, that upon notice merely of a variety of claims by persons amongst whom an entire charge was divided, a bill of interpleader might be filed by the party entitled to be discharged by a single payment, that he might not be harrassed by "the vexation attending the discussion" of the several suits. And it was in some degree upon that ground (as the Lord Chancellor observes, in giving judgment in the case cited) that Lord *Thurlow*, in the case of *The Duke of Bolton v. Williams*, granted a perpetual injunction against the executors of the annuitants, which did not properly belong to a strict bill of interpleader; for though he could very well decide upon that, to whom the arrears were to be paid, yet as sums on account of the future payments would continually be coming into controversy, unless he had restrained them from proceeding in their action, he could not have given that complete relief which was necessary to deliver the

(b) 15 Ves. 246.

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Plaintiff from the vexation to which he would have been liable. Lord *Rosslyn* is also there said to have acted on the same principle, holding, that a Plaintiff was entitled to have all the parties to whom he had made assignments brought before the Court together, and was not to be put to try with each of them the question upon his claim. The present Lord Chancellor, in the same case of *Angell v. Hadden*, speaking of the reasoning of Lords *Rosslyn* and *Thurlow*, on the case of the Duke of *Bolton v. Williams*, says—"The ground of the judgment is, that the Duke held the money for the trustee; if he chose to assert his legal title on behalf of others: but if he would not assert that title, there was a principle of jurisprudence in this Court entitling the Duke to say he had the money ready to be handed over to any person who had the right to it; and, all these persons making claims, to desire the Court to tell him to whom he ought to pay it. The ground, therefore, was not that he might not have been able, by great attention and caution, to make himself secure, but that he might secure himself by one suit, instead of perhaps forty; as one payment ought to discharge him."

In the case of *Dungey v. Angove (c)*, the Lord Chancellor distinctly says, that "a bill of interpleader will lie where the tenant may be liable to pay the rent to one of two different persons,"—laying that down as a general unqualified principle of Equity.

On the whole, therefore, it was submitted, that this was a proper case for the Plaintiff to bring before the Court, to protect himself by its interference from the hazard of complying with either of these conflicting demands, and from the harrassment and vexation of simultaneous suits by the sequestrators and the assignee of the rent.

Barber and *Wakefield*, who appeared for different Defendants, were stopped by the Court.

RICHARDS, *Lord Chief Baron*.—We are asked by this motion to dissolve the injunction which has been obtained ; and the only question is, whether, under the circumstances before us, we shall do so, or continue it? We must determine that question entirely upon what is stated in the several answers, and if we find amongst conflicting titles set up, one prior in point of time, and all the others subsequent to it, there can be no doubt that the party from whom the claim is sought must first satisfy the person who has the preferable title, as being the oldest, just as if it were the common case of two mortgagees, one of them having first got the legal estate.

In this case the Plaintiff holds lands, from which the tithes are due to *Pritchard*—*Pritchard* demised the tithes to him, reserving rent, and that rent he assigned to *Maund*. It was fairly enough urged, that such an assignment was void ; but we are of opinion that it is not. There are many cases in which it has been determined, that a rector may so dispose of part of his property. In fact the sequestra-

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tion itself must necessarily have the effect of admitting that, for if it were not legally assignable, the law would not permit it to be touched by a *feri facias*. We can not, therefore, say that this was a void assignment, on the ground of any existing legal incapacity in the assignor to grant his interest to the assignee, particularly in a question raised between the assignee and the sequestrator.

The lease of the tithes was made in 1820, and the assignment in 1821. The sequestration was then issued long after the assignment. The Plaintiff thereupon filed this bill, which is strictly an interpleading bill, and certainly the Plaintiff had a right to file this bill for any purpose. The Defendants have all put in answers. The Plaintiff having obtained an injunction, on paying the money into Court, now, after all the answers have come in, requires that the injunction may be continued till the hearing; and on those answers we must proceed in determining whether we will do so or not, without regard to any other case which the Plaintiff may hereafter make on producing evidence at the hearing. We see by the answers that *Maund's* title under the assignment is anterior to that of the other Defendants who claim under the sequestration. Upon what possible question, then, can we, under such circumstances, continue this injunction, and thus prevent the party from proceeding to recover his right at law, until we shall have made further inquiry? What inquiry can we make? We can not send it to the Master; for there is in fact nothing to inquire about. From the facts stated on the record, it appears that

Maund

Maund was first entitled. He has therefore a right to priority of payment; and until he is satisfied, the other Defendants who claim under a later title can not make any demand of the rent from the Plaintiff. Consequently, on the facts before us, we can not take any other course than to dissolve the injunction, for there is not on these answers the least foundation for the interference of the Court to restrain the Defendant *Maund* from proceeding to recover the rent assigned to him. The injunction must therefore be dissolved.


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GRAHAM, *Baron*.—I am clearly of opinion that the rector's lease was good in the first instance, and so was the assignment; and I have known instances of mortgagees of rectors recovering in ejectment. Where the priority of different titles is clear, there can be no ground for a bill of interpleader. The case of *Dungey v. Angove (d)* was very properly decided, according to the circumstances, but this is a very different case. Here there are distinct titles in different persons, it is true, but they are not incompatible, and may consist together, where one of the parties has a clearly preferable right to be paid first before the others. *Pritchard's* original right to lease the tithes can not, I think, be impeached on any ground. Suppose he was before the Court in this case, what objection could he make to his assignment of his right for a valuable consideration? As between him and *Maund*, he would be estopped, and those claiming under him

(d) 2 Ves. 312.

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can not be in a better situation than he himself would be. The facts of the case are too clear for argument. Then ejectments have been brought on these very annuities, and no doubt, if it were not for *Maund's* prior title, they might be supported. I myself so determined against Dr. *Bingham*, in a cause tried before me at *Nisi Prius*. If the assignment be not good as to *Maund*, it must be bad as to the other Defendants. In every point of view *Maund* has the preferable title, and we can not interfere upon this bill and the answers to prevent him from recovering upon it. No doubt the injunction ought to be dissolved.

Wood, *Baron*.—I certainly can not say that I am very conversant with the doctrine of interpleader, as entertained in Courts of Equity; but on the question of priority of title, made in this case, I have no doubt. I think it quite clear that the lease and the assignment were in themselves both good. Then there has been nothing shown to impeach the right of the assignee; and his title being good, it is quite impossible that it can be affected by an execution issued after the rent had been legally assigned by deed. There is therefore no reason why the injunction should be continued.

Garrow, *Baron*, concurred.

Injunction Dissolved.

1822.

NANNEY and others v. HUGH TOTTY, Clerk.

[Exception to Master's Certificate.]

THE Plaintiffs, who had been co-Defendants in an original bill with a person of whom the now Defendant was the representative, by this bill, filed Trinity Term, 2 Geo. 4., prayed that the Defendant might either admit assets of the deceased (*William Totty*) sufficient to answer the Plaintiff's demands thereon in respect of the matters therein mentioned, or might set forth an account of the personal estate and effects of which *Totty* was possessed, &c. at the time of his death, &c.: that the Defendant might shew cause why the suit instituted by the deceased, and the proceedings therein, should not stand revived and be in the same condition as at the time of his death: and that the same might stand and be revived accordingly.

The bill set forth a statement of all the proceedings by bill filed in 1784, and bills of revivor and supplement which had been taken in an original suit instituted by and on the behalf of certain persons, creditors of a deceased intestate, against his representatives and other creditors, several of whom were the now Plaintiffs, for an account and payment of their debts, the result of which was, that a reference to take an account was decreed, and it was ordered that the intestate's estates should be applied in

Saturday,
15th June.

A defendant to a bill of revivor cannot put new matter on the record, which might, if stated in the answer to the original bill, have produced a different decree. If he do, it will be impertinent, and may be expunged.

If the bill be not properly a bill of revivor, or if the plaintiff be not a party entitled to file a bill of revivor, the defendant should demur, as by answering he waves the objections, and admits the bill to be a good bill of revivor, and that it may be well filed by the party plaintiff.

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and others
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in payment of his debts, and that an account should be taken of what was due to *William Totty*, one of the defendants in that suit, on a mortgage for principal and interest, and an account of what money had been or might have been received by *Totty* on account of the rents and profits of the mortgaged estate, and that the balance due to or from *Totty* by or to the intestate's estate might be ascertained.

It was afterwards ordered, by a further decree, that a balance of 460*l.* found due to *Totty* on the mortgage should be postponed till the sum of 1026*l.* found to be due from him to the estate on the balance of his accounts as receiver should be paid into Court. A variety of decrees, reports, and further orders, made in the course of the cause, and an Act of Parliament for discharging the intestate's debts out of his real property, were set out in the bill. It was alleged that *Totty* died in 1797, without having paid the 1026*l.* into Court, and that after several successive administrations, on each of which the suit was revived by bill of revivor and supplement, the present Defendant in 1821 became his personal representative: and that it had been decreed that *Totty* and his representatives should assign the deed of demise or mortgage.

The concluding statement of the bill was, that the Defendant had possessed himself of assets to answer the money reported to be due from *William Totty*; and therefore the Plaintiffs prayed, &c. (as above.)

The

The bill interrogated to the facts of the proceedings having taken place, and the decrees and orders having been made as alleged.

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The Defendant put in a very unusually long and full answer, consisting almost entirely of allegations calculated to make a new case of defence, and to put fresh matter in issue which had not previously been before the Court on any former occasion; alleging, amongst other things, that many sums of money, to a considerable amount, had been advanced by *William Totty* on account of the intestate, which the deputy-remembrancer had refused to allow him in his accounts, and offering to prove that fact; and stating reasons why more time had not been allowed for the passing such accounts, and that the decree was to be made subject to a further account, and that an unassigned term was permitted to remain outstanding in *William Totty*, as a security for the balance which might be due to him, and was still in the Defendant; and that the parties had endeavoured to come to an agreement to refer the accounts to arbitration, but without being able to do so, although bonds of arbitration had been prepared. He also relied on a bond given by the administrator of the intestate, and other documents in support of his account.

On the 9th of *May*, *Temple* obtained an order to refer the Defendant's answer to the Plaintiff's bill of revivor "and supplement" for impertinence, whereupon the Master certified it to be impertinent; and, referring to the impertinent passages,

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sages, it applied to nearly the whole of the answer.

A general exception was filed to that report, which now came on to be argued.

Martin and Daniel, in support of the exception, submitted, that the Master having proceeded on the assumption that this was a mere bill of revivor, had been in an error, for that this bill was in effect, when considered with reference to the parties, Plaintiffs on this record, who were different from those who were Defendants in the original suit, and with reference to the matters stated in this bill, many of which were new, necessarily to be treated as a supplemental bill; and the Defendant had a right, in order to meet the Plaintiff's statements, to put on the record such facts as would be of effect in contradicting the allegations. And they urged, that this being originally a creditor's suit, could only be revived by supplemental bill, as there was no privity between the now Plaintiffs and the Plaintiffs to the original bill, entitling them to file a mere bill of revivor as a matter of course,—that a defence by a mortgagee to a creditor's bill might be very different from that to a suit by representatives, to which the original Plaintiffs were not parties, as in this case.

Fonblanque and Temple, who appeared for the Plaintiffs, to support the Master's Report were not called upon by the Court to offer any thing in answer to the exception.

RICHARDS,

RICHARDS, *Lord Chief Baron*.—This bill is filed by parties who were some of them at least Defendants to the original suit. They certainly might divide and file a bill of revivor, according to the exigencies of the case. The question is, whether this is a bill of revivor or not? If it be not strictly a bill of revivor, or if a bill of revivor could not be properly filed, the proper course for the Defendant to have taken, and his only course of raising objections to the bill, would have been to have demurred, if he is right. There being no demurrer on that ground, we must take it that this is a bill of revivor; and certainly any parties interested in the decree against the original Defendant, *William Totty*, would have a right to file a bill of revivor against him if he had been now alive; and he, as Defendant to that bill, could not have put in an answer containing new facts, which might, if it had been filed originally, have produced a different decree. The present Defendant is precisely in the same situation. By putting in an answer, the objections which have been taken, if they were well founded, are waved. It is then admitted that the bill is properly a bill of revivor, and that the parties have a right to revive.

If we were to allow this exception, I do not know to what extent we should be imposing inconvenience on suitors; for I do not see why an executor against whom a suit should be revived, might not as well put a new case on the record, and go to commission, to bring up any new facts which might have induced a different decree from that already

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ready made in the original suit, sought to be revived.

I am therefore clearly of opinion, that this answer is impertinent, as the Master has certified to us.

The rest of the Court concurred.

Exception overruled.

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The Court will not set aside the service of a writ for irregularity, in being served in a city locally within a county where it was directed to the Sheriff of that county, if the defendant have paid the debt and part of the costs; for such an irregularity may be waved by the conduct of the defendant.

A rule to shew cause under such circumstances discharged with costs.

MONDAY v. SEAR.

PRICE shewed cause against a rule, which had been obtained on the 7th of *June*, by Sir *William Owen*, for setting aside the service of the writ of *quo minus* issued in this cause for irregularity, with costs.

The objection raised by the Defendant's affidavit was, that it was served in the city of *Canterbury*, being directed to the Sheriff of *Kent*. The writ was issued on the 24th of *April*, and served on the 13th of *May*.

That

An application for such a purpose must be made in the first instance.

It is not necessary in this Court that the affidavit on which such an application is founded should negative that the process was served on the confines, and that there existed any dispute about the boundaries.

That was answered by affidavit of the fact, that the Defendant had since paid the debt (4*l.*), and 30*s.* towards the costs, undertaking to pay the remainder, if more should be justly due.

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It was now urged as cause against making the rule absolute—first, that the affidavit on which it had been obtained was insufficient to support the application, because it did not negative that the process was served on the confines of the proper jurisdiction, and it did not allege that there was no dispute about the boundaries, both of which allegations were made necessary by the rules of practice in such cases : ——— v. *Walters* (a), *Twiss* v. *Williams* (b); for if the boundaries be in dispute, the Courts will not disturb the service, *Chase* v. *Joyce* (c).

[Wood, *Baron*.—There can be no reason for requiring the Defendant to negative the existence of any doubt as to the boundaries, when he swears that he was served in the city of *Canterbury* with copy of process, directed to the Sheriff of *Kent*. There is no such rule in this Court certainly. If there was any dispute about the boundaries, that should be shewn by the other party who resists the application on that ground.]

It was then submitted that the application was now too late, even if there were any thing in the objection on which it was founded, the rule of this

(a) 1 Chit. Rep. 14.

(c) 4 Maule and Selw. 412.

(b) 1 Chit. 15. and 333. *in notis*.

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Court being, that in such cases the party shall apply in the first instance, and within the term (if there be sufficient time) in which the irregularity occurred, citing an anonymous case (*d*) from the Exchequer Reports—that in fact there were seven days remaining of Easter Term on the 13th of *May*. In the King's Bench the rule is, that the party must apply in reasonable time : — *v. Walters (e)*, *Ellis v. — (f)*. Another answer to the motion was pressed as conclusive, that the cause of action had been settled; and that was relied on as being alone sufficient ground for discharging the present rule.

Sir *William Owen*, in support of the rule, contended, that the service in this case was merely void : *Willis v. Pendrill (g)*, *Williams* and another *v. Gregg (h)*,—and that, like service of process on a *Sunday*, it could not, therefore, under any circumstances, be acted upon or made good by any subsequent conduct of the parties.

[*Wood, Baron.*—In case of service of process on a *Sunday*, that certainly may be true, but the reason is, because such service is made bad by the express provision of an Act of Parliament*.

On the point of waver, it was urged, that to wave an irregularity, the party must take some further

(*d*) 3 Price Exch. Rep. 37.

(*e*) Chit. Rep. 14 (n. l.)

(*f*) 1 Chit. Rep. 333.

(*g*) 2 New Rep. 167.

(*h*) 7 Taunt. 233. 2 Marsh. 550. S. C.

* 29 Cha. II. ch. 7. sect. 6. and *vide Taylor v. Phillips*, 3 East. 155.

step in the cause, but this, it was contended, was such an irregularity as could not be waved.

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A case of *Osborne v. Taylor* (i) was cited, to shew, that for an irregularity founded on a void execution of process, as an arrest on the Ascension day, the Court would set aside the proceedings, and that it could not be waved by the Defendant, because it was such an irregularity as the Court must necessarily notice, and therefore could not be cured by any conduct of the Defendant; for wherever the irregularity affected the due course of proceeding, it could not be waved, because the Court was bound: *Goodwin qui tam v. Parry* (k).

On the question of laches, it was insisted, that the Defendant was not bound to apply to the Court, and indeed ought not, until further proceedings should be had by the party guilty of the irregularity: *Fletcher v. Wells* (l), *Ledwich v. Prangnell* (m).

Per Curiam,

There can be no doubt but that all such applications as this, founded on irregularities of this description, ought to be made in the first instance, and where the party can not satisfactorily account for not applying sooner than he does, the Court will not assist him. In this case there is this additional circumstance, that the matter has been set-

(i) 1 Chit. 400.

(k) 4 Term Rep. 577.

(l) 1 Marsh. 550. and 6 Taunt.

191. S. C.

(m) 1 B. Moore, 300.

tled,

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tled, for the debt has been paid, and part of the costs. That is certainly quite conclusive against the Defendant making such an application: so much so, that if the Court had been made aware of it when the motion was made, the rule would not have been granted. We therefore think it must now be discharged, and with costs.

Rule discharged—

With Costs.

Monday.
17th June.

MARKHAM V. SMYTH, Bart. and others.

Construction and effect of very ancient documentary evidence (opposed to a case of uninterrupted non-payment) in a suit for tithes as applied to the claim, and to a defence of prescription in *non decimando*, on the ground of the lands having belonged to a religious House.

THIS bill was filed for an account of the tithes of corn, grain, hay, wool and lamb, claimed by the Plaintiff as lessee of the Rev. *H. F. Mills*, Chancellor of the Cathedral Church of *York*, and Rector of the parish of *Waghen*, in the county of *York*, from the Defendants, the owner and occupiers of lands in the townships of *Waghen* and *Meaux*.

The Defendants (fourteen in number) relied on different

To support such a defence the lands must be shewn to have belonged to the religious House before time of legal memory; it is not sufficient to show that the lands were in the hands of the religious House at the time of the dissolution.

In claiming an exemption from tithes for particular lands, such lands must be accurately described in the defendant's pleadings, and their local situation and boundaries set out.

An issue directed as to a money payment, in respect of an ancient composition.

A land owner, not being an occupier, made defendant, is entitled to have the bill dismissed as against him, with costs; but if he mixes in the defence, and examines witnesses, although the bill must be dismissed as against him, he will not be entitled to costs.

different defences. The substance of the defence set up by Sir *W. Smyth* and his tenants was, that divers lands of *Waghen*, with the rectory or church of the said parish (except twelve oxgangs of land which were alleged to have been a composition real, and in respect whereof a sum of 45*s.* a year was stated to be payable) were before the time of legal memory, part of the possessions of the abbey of *Meaux*, in the county of *York* (the monks of which abbey were Cistercian), and appropriated to the church of *St. Peter, York*: that divers lands in *Waghen* were allotted to the said rectory and chancellorship; that the abbey became seised of other lands within the parish of *Waghen*, and of two mills; and that the abbey held all such their lands discharged of tithes to the rectory, and never paid any; and that the abbey was one of the great abbey dissolved by the 31st of *Henry* the 8th.

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In answer to that defence, the plaintiff insisted that the lands in *Waghen* belonged to the abbot and convent of *Albemarle*, who committed the care and disposal of the rectory to the archbishop of *York*; and that, after the time of legal memory, the abbot and convent of *Meaux*, formerly called *Melsa*, obtained land in the parish of *Waghen*, and accepted leases (commencing in 1488) from former chancellors of the cathedral church of *St. Peter, York*, as rector of the parish church of *Waghen*, of the church and lands and tenements thereto belonging; and also the tithes of sheaves, hay, lamb and wool. In support of that case, they gave in evidence

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evidence many ancient documents and instruments, all of which, as far as they materially applied, are stated and noticed in the judgment delivered by the Lord Chief Baron.

The whole case, and evidence, on both sides, indeed, are so very fully and minutely gone into by his Lordship, that it will be sufficient to give the judgment in the Lord Chief Baron's words.

Jervis and *Finch* were, of Counsel, with the Plaintiff: and *Martin*, *Pepys*, *Boteler*, *Roots*, *Bickersteth*, and *Duckworth*, for the several Defendants.

The case was heard for several days in last Easter Term, and having been adjourned :

The Lord Chief Baron now delivered judgment.

This suit is instituted by the Plaintiff as lessee of the Rev. *Henry Foster Mills*, the Chancellor of the cathedral church of *York*, and the appropriate Rector of the parish of *Waghen*, in the county of *York*. The bill states that Mr. *Mills* as Chancellor and Rector was entitled to all the tithes of hay, corn, wool, and lamb yearly arising in that parish, and that he demised them as well as the rectory to which they belonged to Mr. *Markham*, the Plaintiff, by an indenture bearing date the 20th *May*, 1819, by the description of the said rectory and parsonage, together with the glebe lands and tithes thereunto belonging. This parish is divided

vided into two parts, namely, the township of *Waghen*, and the township of *Meaux*. In the argument, and in the evidence, allusions were made to some minor divisions, but there is no notice taken at all of any divisions in the answer but the two I have mentioned, *Waghen* and *Meaux*. The defendants *Robert Ramsey*, *William Mumby*, *Christopher Nicholson*, *William Ranson*, *Marmaduke Leake*, *John Jackson*, and *Thomas Hopkinson*, occupy lands in the township of *Waghen*, and no other part of the parish. The Defendant *Sir William Smyth*, the first-named Defendant, is the owner of the lands; but he not being an occupier, no account can be taken against him. The other Defendants occupy lands in *Meaux*, and no other part of the parish; all the Defendants, except *Sir William Smyth*, have had corn, grain, hay, wool, and lamb, and the object of the suit is to recover the tithes of those several articles. The Plaintiff, as he represents the rector, is *primâ facie* entitled to the tithes which he claims, but the Defendants insist that they are exempt by a prescription in *non decimando* from the payment of the tithes demanded, or of any tithes in general, or any satisfaction for those tithes. The Plaintiff being entitled by law, of course, the burthen of proof is cast upon the Defendants; and if they fail, the Plaintiff must prevail, and obtain a decree against them. Though all the Defendants claim on the ground of prescription, they do not concur in their defences, but sever in the manner of stating them.

I will first consider the case of those who occupy lands in the township of *Meaux*. They say that

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the Abbey of *Meaux*, one of the greater Abbeys, was founded before the time of legal memory; that the farms and lands occupied by those Defendants had been a parcel of the lands of the Abbey before the time of legal memory, and continued to be so till the dissolution in King *Henry* the 8th's time : that at the time of the Dissolution, the Abbey held and was entitled to the same lands, free and discharged from the payment of tithes to the rector or the owner of the rectory; and that the premises passed to the Crown on the Dissolution, and from the Crown to the persons under whom those parties claim. This is the statement in the answer. No objection has been taken, and none occurs to me, to that defence, as stated upon the record ; and the enquiry, whether it is supported by evidence, will be the only object of our attention.

It is clear that the circumstance alone of the lands being part of the possessions of the abbey at its dissolution, does not give those lands the privilege of exemption, for a religious House was as liable to render tithes as any other occupier, unless it had a legal ground of exemption. What would be a sufficient ground of exemption, need not be considered in this case, where prescription is the only ground relied upon. We know there is a common mistake gone out that ought to be corrected, and it is corrected whenever it is brought under the notice of the Courts, that because land happens to have been Abbey land, it is exempt from the payment of tithes. For that there is no foundation whatever. It is also certainly equally clear, that

that a religious House was always capable of prescribing in *non decimando*, and the right to do so would devolve upon the trustees of the Crown under the act of Parliament; but it must be recollected, that such exemption, to be well founded, must have existed beyond legal memory, and must have been enjoyed, on the part of the religious House, from time immemorial: and to support the argument here, that the Abbey had any right to prescribe for the lands to which that prescription is applied, they must be shewn by competent evidence to have been possessed by the Abbey before the time of legal memory; that is the clear rule on this subject. What that evidence should be, will depend always upon circumstances, but it must be competent evidence to enable a Court of Judicature to infer it.

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I think that the Defendants whose defence I am now considering have proved that this religious House had some lands in the township of *Meaux* before the time of legal memory; but I must observe, that they are anxious to separate entirely the township of *Meaux* from that of *Waghen*, and to keep the two perfectly distinct from each other. They produce first a charter of King *Stephen* before the time of legal memory, from an *inspeximus* of King *Richard II.*, by which he grants as follows;
 “ *Donationem illam quam W Comes Albemarle fecit*
 “ *cit Deo et Ecclesie Sancte Marie et Monachis*
 “ *de Melsa scilicet Villam Melse et boscum de Ruda*
 “ *et totum Wagham scilicet tam partem illam que*
 “ *est de patrimonio suo quam illam partem quam*

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“ *tenet de Archiepiscopi et passagium et ecclesiam pre-*
dicte Ville et hanc predictam terram videlicet duo-
decim carucatas terre duo scilicet in Melsa et decem
alias in Wagha.” Then it goes on to state fur-
 ther, what it is not necessary to repeat here. I
 find myself, after the best attention I can give the
 subject, at some little loss in understanding the pre-
 cise meaning of this document. It cannot be con-
 strued to embrace all *Waghen* and *Meaux*, for if
 so, it would hardly have specified two carrucates in
 the one, and ten in the other, that quantity being
 less than either of them. All I can safely gather
 from it then is, that some distinction is marked be-
 tween *Waghen* and *Meaux*, and that *Meaux* had
 two carrucates of land in some part of the township
 of *Meaux*, and that *Waghen* had ten carrucates in
 like manner.

These defendants have given in evidence se-
 condly, a rental of the possessions of the abbey in
 the 31st *Henry VIII*, and minister's accounts of
 the same reign, and the particulars of a grant to
 the Earl of *Warwick*. Those documents do not
 seem to me to prove any distinction between the
 township of *Waghen* and of *Meaux*: they only
 prove that the parcels described in them were par-
 cels in the possession of the Abbey at the time of
 the dissolution, and that certain lands now occu-
 pied by those Defendants are the same. The locality
 of the premises in question in those documents is
 sometimes stated to be in the territory, and some-
 times in the lordship of *Meaux*, the information
 afforded by them being that they were in the pos-
 session

session of the Abbey of *Meaux*; and it may be doubted whether the territory or the lordship of *Meaux* is intended, or the township of *Meaux* only. That is a difficulty which almost always happens in every ancient case. It is a subject upon which we have very little light, and I cannot draw any direct conclusion from those documents, as to that part of the case.

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Then comes the parliamentary survey of the possessions of *Meaux*, settled by *Charles I.* upon *Henry Earl of Holland*, *Edward Earl of Dorset*, and others in trust, for the sole and proper use and benefit of his Queen *Henrietta Maria*; there is the following memorandum at the end:—"The forementioned premises, with the appurtenances are tithe free, as having never been charged therewith." Those premises are in the township of *Meaux*. That memorandum is important, as forming strong evidence of reputation at that time, and may be fairly applied in argument to the estates of the Abbey in this township which did not remain in the Crown, supposing they mean the township, and not the general possessions of the Abbey, there being collaterally a distinction between the two throughout.

A great many other grants and conveyances have been given in evidence, which prove that the township or lordship in *Meaux* (it is sometimes named the one, and sometimes the other), stands by itself, and is separated and distinct from the township of *Waghen*, though both, from the evidence, appear to be in the same parish. I observe this, because it

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was supposed that they were two different parishes, of which there is no distinct evidence.

I think it is proved, and if not it is admitted at the Bar, that all the lands in the township of *Meaux* were portion of the possessions of the Abbey at the time of its dissolution. Add to this, that there is no evidence of the rector ever having received from the township of *Meaux* any tithes of any description; there is no evidence of his having actually received them; and the reputation has been, as far as it could be traced, that no tithes have ever been paid; and I must presume that none of the tithes demanded by this suit have, as far as living memory can reach, been accounted for, paid or demanded. Besides this, there is no evidence of any tithes having been actually rendered in kind, or accounted for by way of composition, or otherwise, to the vicar, excepting so far as the terriers (to be noticed hereafter), may be considered as evidence of actual prescription. So that the result is, that some lands in the township of *Meaux* were in a religious House from time immemorial; and that all the lands in the township were in the religious House at the time of the dissolution: and from the evidence, I must presume that none of the tithes claimed by the plaintiff have been ever since the dissolution rendered, accounted for, or even demanded. There is no evidence that the tithes ascribed to the vicar have been rendered or accounted for with respect to this township, except the evidence arising from the terriers. The consequence in law is, that if the terriers were removed,

moved, there is strong *primâ facie* evidence of a prescription in *non decimando*.

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Now, under the circumstances of the case, the occupiers in the township of *Meaux* may, according to law, resist, upon the ground of the prescription stated before. I mean to say, that the consequence of all this is, that if the terriers were removed, there is strong *primâ facie* evidence of a prescription in *non decimando*. If that could be supported, then, under the circumstances, the occupiers of the township of *Meaux* have a right to rest upon that, and they would be protected by it so far for the present, with respect to the township of *Meaux*. For a moment therefore, I shall quit this part of the case, and consider the defence of Sir *William Smyth* and his tenants occupying lands in the township of *Waghen*, and then I shall endeavour to review the evidence given for the Plaintiff as applying to both cases, which is to be considered in strictness, as a reply—the legal right being with the Rector.

I wish now to consider the manner in which Sir *William Smyth* and his tenants lay their defence, having stated how the other Defendants have laid theirs. Sir *William Smyth* and his tenants plead, that divers lands in the parish of *Waghen*, together with the rectory or church of that parish, were before the time of legal memory, part of the possessions of the abbey of *Melsa*. otherwise *Meaux*, and that the monks of that abbey were Cistercians; that afterwards, and previously to the reign of King
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Henry III., the rectory was appropriated to the Chancellor of the metropolitan Church of *St. Peter* and of *York*, and that divers lands in *Waghen* were allotted to the said rectory or Chancellorship, and the Abbey became seized of other lands in that parish, and of two mills. They also say they believe that the Abbey held all their said lands, and the mills in that parish, discharged of all tithes to the Rectory, and never paid any such tithes. Thus they in effect say, that divers lands in the parish belonged to the Abbey, and that before the time of legal memory the Rectory was appropriated to the Chancellorship, and that the Abbey then became seized of other lands. I cannot assent to the propriety of this mode of pleading a prescription in *non decimando*, which is to cover all the lands occupied by the Defendants; and I conceive it cannot be of any avail in this case. Let us consider it: they aver, that divers lands in the parish were in a religious house time immemorial; they do not specify or point out those lands, even if the rest of the case would have let that in. The Rector is left to find them out as he can, which is inconsistent with all the rules of pleading in these cases. They may be in the township of *Meaux*, so far as appears in the statement; but it is not averred they are lands in the occupation of these Defendants, or that they deduce their title from Sir *William Smyth*; but this objection would be material only if their defence was confined to those lands. The answer is on this I conceive subject to a very formidable objection. The answer then proceeds to state that afterwards, (that is, as seems to me, after the time of legal memory), and previously

to

to the reign of King *Henry III*, the rectory was appropriated, and divers lands were allotted to it, and that the Abbey became seised of other lands and two mills. Now the Abbey being thus seised of lands, it must be ascribed to some time after legal memory. The substance of that allegation is this, that the Abbey had some lands in the parish before the time of legal memory, and acquired other lands in the parish, after the time of legal memory; from whom is not suggested. The Defendants then say they believe that the Abbey held all their lands in the said parish, discharged of all tithes to the rectory, and never paid any; and therefore the Defendants insist that the lands occupied by them are exempt from tithes by virtue of a prescription in *non decimando*; that is, that all their said lands in the said parish are discharged of all tithes to the rector or the rectory, not of all tithes generally. I have stated already, that to support such a prescription, there must be competent evidence to satisfy the Court that such lands were in a religious House before the time of legal memory; but here the Defendants admit that some of the lands for which they claim the prescription, were not in that Abbey till some period after the time of legal memory. Thus the answer destroys the prescription insisted upon in the argument; and it must be recollected, that this defence is applied to all the lands in the occupation of these Defendants.

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Then their answer proceeds to another defence as to part of the lands in their occupation, namely, that in the reign of King *Henry III*. certain disputes took place between the said Chancellor of
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York, as Rector of the said parish of *Waghen*, and the Abbot of *Melsa*, otherwise *Meaux*, respecting the tithes of twelve oxgangs of land, and of certain pastures, in places called *Besingab* and *Amplek*, then brought into cultivation, and of the said mills, and respecting wrongs alleged to have been done by the said Abbot in obstructing the roads to certain pastures, and otherwise. Thereupon suits were instituted, and for a long time depending, both in *England* and in the Consistory Court of *Rome*, between the said Chancellor and the said Abbot and Convent, respecting such matters. At length, in the year 1257, long after the time of legal memory, it is stated, that an agreement was entered into, by way of compromise, between the said Chancellor, he being the patron as well as the rector of the said rectory, with the consent of the Archbishop of *York* and the Abbot and Convent of *Melsa*, otherwise *Meaux*, that the said suits should be put an end to: that the said Abbey and Convent should for ever *thereafter* be free and discharged from the payment of of all the aforesaid tithes, and that the said Abbot and Convent, for the sake of peace, should pay perpetually the annual sum or composition of 45s., to be issuing out of lands of the said Abbey within the said parish. And then the Defendants state in their answer, that the said composition was duly established, and the same continued to be paid up to the time of the dissolution of the said Abbey, except that for a short time preceding such dissolution, the Abbot of the said Abbey or Monastery was lessee of the said Rectory, and no tithes or payment in lieu of

of tithes were or was ever made to the said Rectory of *Waghen*, in respect of any lands belonging to the said Abbey, save as aforesaid. This is the defence as stated in the answer, and this part of the statement of the answer must be distinguished from that which I intend to consider presently. The Defendants do not affect to point out the locality of the oxgangs, which would be a fatal objection if this part of the case stood by itself. But by the very mode of laying their claim they destroy their title to exemption by prescription, if the former part of the answer had not; for though we had gone no further, it would have been impossible for me to assist the Defendants on the defence stated on the record, whatever the merits of the case might be. Yet as the subject-matter of the suit is of great value, and as it may be useful to all parties hereafter, I will for their satisfaction examine the evidence, to see whether any good or valid defence at law can be made out of what appears from the pleadings and the evidence.

These Defendants produce, as the other Defendants did—(I am now proceeding to the evidence, having done with the defence in the answer)—they produce an *inspeximus* of the charter of King *Stephen*, which it is not necessary again to recite, from which it appears, that *Waghen* had ten carrucates of land before the time of legal memory. Whether liable to tithes or not is entirely a different question. Then comes a charter of King *John*, which is after the time of legal memory, confirming the grant of the Archbishop of *York*, and adding two carrucates,

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cates, so that if this were admissible, they had twelve carrucates of land. Other charters are produced, to shew the Abbey had certain lands in their possession from time to time. For the same purpose the ecclesiastical survey of 26th *Henry VIII.*, the rental of the Abbey, the Minister's accounts, and also other evidence which goes to prove the same fact, were produced. But the premises before described seem to be all in the township and territory of *Meaux*; and though such evidence operates sometimes as strong evidence of reputation, it operates here adversely to the claim set up in the township of *Waghen*. Then there is a grant of the Crown to the City of *London*, which is supposed to be in deduction of title, and that purports to grant all the tithes in the township, which negatives the plea of exemption in the Defendants under Sir *William Smyth*, for if all the tithes passed, there could be no exemption. Other grants of tithes are produced in deduction of the title in Sir *William Smyth*, and at a given period the Defendants decline to produce any more. Now it is clear in many cases that the Defendant is, by the course of the Court, required, in a case of this description, to shew his conveyances, in order to satisfy the Court that there is nothing in them that assists the Plaintiff's case. That is to be found in a great number of cases, but I need say no more upon that head.

Then follows the evidence of non-payment and reputation.

This is the substance of the evidence given for
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the Defendants, and it seems to me to amount to this, —supposing that the statement of the answer had been sufficient to let in, as far as it had gone, this defence of the Defendants, for as I said before, I go through the evidence only to shew how little of it alone applies to any real merits in the case—the substance of it is this, merely that the Abbey had before the time of legal memory ten or twelve carrucates of land in the parish of *Waghen*. Still their locality does not appear: and it does not follow they were exempt from tithes because they belonged to the Abbey before the time of legal memory, though it must be admitted in law they were capable of so holding them. It appears that this Abbey had also lands in the parish after the time of legal memory, some of which, but whether all or not we are not informed, are proved by the composition of 1257 not to be exempted. That therefore destroys the prescription. The lands there described are as uncertain as those of the carrucates, but I think the identity of some of the lands occupied by some of the Defendants is ascertained, or at least reasonably so, by the evidence. It is certainly proved that none of the tithes claimed have been paid since the Dissolution: and this I take to be the whole substance of the evidence on the part of the Defendants.

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Upon this evidence it would be difficult to say that the prescription of *non decimando* has been established, even without looking to the evidence of the Plaintiff, who is here claiming the tithes, and in whom *primâ facie* the legal right is vested; and more especially

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especially when we connect this evidence with the defence set up by the answer.

We will now consider the evidence furnished by the Plaintiff, whose legal title is clear and unquestionable, unless you can affect and destroy it upon legal principles. He produces a grant from the Abbot of *Albemarle*, dated the 27th of *February* 1229, of the domain and advowson of the rectory to the Archbishop of *York*, absolutely. This proceeds from the Abbot of *Albermarle*, by which the Archbishop of *York* gets the whole of the advowson. Another charter is also produced. Then in the following year, 1229, there is a fine levied between *Walter*, the same Archbishop of *York*, the grantee, concerning twelve oxgangs of land, and the appurtenances, in *Waghen*, but whether in the township or the parish, I have found it very difficult to satisfy myself. There the Abbot acknowledges those lands, with the appurtenances, to be the right of the Archbishop of the see of *York*, and in consideration thereof the Archbishop grants it to him and all his successors of the church of *Melsa*, with a rent reserved, and the Abbot acknowledges he has no right to the advowson of the church at *Waghen*, and releases all right for himself and his successors, by which means the property in this rectory and the advowson are established in the Archbishop: this last instrument, the fine levied, is dated in 1229. In the next year, 1230, the Archbishop, with the consent of the Dean and Chapter, appropriated the church of *Waghen* and the appurtenances to the Chancellor of the church of *York*, and to his successors

cessors for ever, so that the Archbishop's right is transferred in 1230 to the lessor of the present Plaintiff, or at least the person under whom he now claims; this is in 1230. Fourteen years afterwards, in 1244 the Chancellor appoints *Richard of Oveden* to the Vicarage and the Church of *Waghen*, and to him all the Altarage, except the tithes of hay, lambs, and wool, belonging to the church; which he the Chancellor retains to himself and his successors for ever. I have already made some observations upon the composition real, as stated in the answer; I shall again advert to it as given in evidence.

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The next document produced by the Plaintiff, or at least insisted upon on his behalf is, the composition real in 1257. Let us attend to this particularly. It is described "*Compositio inter Cancellarium et Abbatem et Conventum de Melsa super decimis apud Waghenam.*" That instrument recites all the causes of dispute; it seems the first was a dispute of the tithes of twelve oxgangs of land, which the monks cultivated, "*excolunt*" is the word, in the parish of *Waghen*. We may note here that the House was of the Cistercian order: and from the word "*excolunt*," we may probably suppose that they cultivated those oxgangs in *propriis manibus*. Then we have these words, "*Item super eo quod in hijs locis qui dicuntur Besingab et Amplek pascua quedam de quibus decime debebantur redegerunt ad culturam Item super eo quod vias solitas animalium cuncium ad pascua obstruxerunt Item super eo*"
 "quod

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“ *quod pascua adjacentia fossate quod dicitur Munke-*
 “ *dyke plus solito mundare fecerunt Item super eo*
 “ *quod quedam edificia inpastura construxerunt Item*
 “ *super eo quod pratum adjacens stagno suo ad mo-*
 “ *lendum de Fiskehus per aque retencionem mun-*
 “ *dare fecerunt ut dicebat Cancellarius predictus Item*
 “ *super eo quod petiit decimas molendini que dicti*
 “ *Abbas et Conventus adquisierunt post concilium in*
 “ *parochia de Wagnam lis mota fuisset.*” Then other
 causes of strife are mentioned not connected with
 tithes; then comes the agreement to pay 45 s. by
 two half-yearly payments, “ *quod dicti Abbas et Con-*
 “ *ventus et eorum Monasterium quieti erunt perpetuo*
 “ *et immunes a prestacione predictarum decimarum*
 “ *omnium et solvent pro bono pacis perpetuo dicto can-*
 “ *cellario et suis successoribus, nomine Ecclesie de*
 “ *Waghen singulis annis quadraginta quinque solidos*
 “ *sterlingorum apud Waghenam in duobus anni ter-*
 “ *minis videlicet in festo beati Martini hyemali vi-*
 “ *ginti duos solidos et sex denarios et in festo Pen-*
 “ *tecosti viginti duos solidos et sex denarios Renun-*
 “ *ciavit eciam uterque pars petitionem restitutionis*
 “ *in integrum et impetratis et impetrandis super pre-*
 “ *dictis fideliter promittendo de compositione presenti*
 “ *duratura observando.*”

The next instrument in order of time is a very important one indeed. It is a lease of the 12th March 1488, between *William Langton*, Doctor of Divinity, Chancellor of *York*, of the first part, and the Abbot and Convent of *Meaux* of the second part. Dr. *Langton*, the Chancellor describes himself as
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the Chancellor of the cathedral church, and as rector and proprietor of the parsonage of *Waghen*, with all its rights and appurtenances, “*Salva portione vicarii in eadem pro tempore existente assignata in proprium usum;*” thereby noticing as between himself and the Convent not only his own right, that he was, as rector, entitled to all the rights and appurtenances of the church, but by expressly preserving the portion of the vicar, it is acknowledged that there was a vicar, and that a portion was assigned to him. Then a large quantity of land is demised by the Chancellor “*nec non omnimodas decimas garbarum feni agnorum et lane.*” Those tithes (with the exception of “*garbarum*” only, which was not granted to the vicar by the instrument dated in 1244, which I must call an endowment, because I have no doubt that it was an endowment) are the very tithes which were expressly excepted out of the *allorage* allotted to the vicar thereby: and that is a very material circumstance in this case. Therefore, when I find those same tithes demised by this lease of 1488, and followed by subsequent demises in other leases, I must presume that in some way or other the vicar had restored to the rectorial part of the church, that which had been granted in the endowment. Those are the tithes which are the subject of this suit. The demise also expresses, “*ac alias obventiones ecclesiasticas et emolumenta quecumque eidem Wilhelmno cancellario ratione dicte ecclesie parochialis sive dicte cancellarie sue de et in ecclesie parochiali predicta ac in villa et territorio de Waghen, predicta.*” That was a demise to the convent

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and their successors for 99 years, rendering the yearly rent of 20*l.*, which was a very considerable rent for that time ; and it was confirmed by the dean and chapter of *York*.

This lease, as I have stated, bears date in 1488. Then in 1538,—the term of 99 years not being expired, what became of it we do not know ; but the old lease would merge in the new one—another lease, 50 years after the former, was made by the then Chancellor, with the like reservation of rent, for 51 years with the consent of the archbishop. By that is demised to the abbot and convent, “ *et eorum successoribus ecclesiam parochialem pre-* ”
 “ *dictam et rectoriam ejusdem ac mansum sive mane-* ”
 “ *rium eidem ecclesie parochiali pertinentem cum her-* ”
 “ *bagio cemeterii ac etiam omnia et singula terras* ”
 “ *et tenementa redditus reversiones et servicia dicte* ”
 “ *parochiali ecclesie sive prefato Galfrido cancellario* ”
 “ *ratione ejusdem ecclesie parochialis sive cancellarie* ”
 “ *sue in ecclesia cathedrali Eboraci predicta in villa* ”
 “ *et territorio de Waghen predicta pertinentia sive* ”
 “ *spectantia que idem Galfridus cancellarius duxerit* ”
 “ *hic specialiter exprimenda.*” Then the instrument specifies divers lands, and proceeds to demise the tithes in the same words as had been used in the former lease, at a rent amounting in value to 20*l.* a-year. The language in these two leases, as far as it relates to the tithes demised, is as general as it can be. There is not the smallest exception or restriction or qualification, unless this can be called a qualification : “ *quovismodo debitas seu debendas* ”
 “ *una cum curijs et aliis suis proficuis comoditatibus* ”
 “ *ac*

*“ ac pertinentiis quibuscunque preter vicariam dicte
 “ ecclesie parochialis que locata est juxta ecclesiam
 “ predictam in parte australi predicti circuli habend.
 “ et tenend. omnia et singula predict. ecclesiam pa-
 “ rochiale rectoriam mansum sive manerium cum
 “ herbagio cemiterii terras tenementa redditu re-
 “ versiones et servicia cum suis pertinentiis pre-
 “ dictis ac decimas et emolumenta ac cetera premissa
 “ cum omnibus et singulis suis juribus et pertinentiis
 “ quovismodo debitas seu debendas ;”* so that the
 words are large enough : and this being a dealing
 with the rector, it must be supposed to relate to
 the tithes to which he had a right, except those
 which had been assigned to the vicar; and I appre-
 hend it necessarily embraces all the tithes in the
 parish, or at least in that part of the parish which
 is called *Waghen* ; for I cannot but think, that if
 the lessees were exempted from the tithes in any
 part of the parish, they would have been careful to
 have expressed it by some proviso to be found in
 the leases. The instruments are prepared with
 great attention, and are of considerable length for
 that time of day ; and it is observable, that the
 rights of the vicar and offices are guarded and
 saved. They go to authenticate the tithes in a
 great degree ; and it cannot be forgotten, for that
 is of much importance, that the Defendants, hav-
 ing no claim but through the Abbey, are bound
 by the acts of the Abbey, which prove more satis-
 factorily than any thing else can do what the rights
 of the Abbey were. It is difficult, therefore, to
 suppose that any lands belonging to the Abbey
 in this parish were exempt from the tithes of hay,

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lamb, and wool, which had been granted by those two several leases. Then it must be remembered, that at the end of each of those leases there is a proviso which was considered as favourable to the Defendants. It runs, "*Proviso semper quod nec presens tradicio concessio et firme dismissio nec admissio ejusdem in aliquo se extendat aut extendant in dampnum seu prejudicium prefatis abbati et conventui ac successoribus suis predictis de aliquibus possessionibus terris tenementis redditibus serviciis dominiorum curiis commoditatibus communium seu aliquorum aliorum jurium de aut in Waghen predicta dicti abbati et conventui et successoribus suis predictis jure monasterii beate Marie Virginis de Melsa predicta pertinentibus nec sit eisdem in aliquo prejudiciales.*" Now, though the subject-matter of the proviso is so general and undefined, I cannot find any thing as to an exemption from tithes in all the range of those which the rector had a right to claim. I do not mean to say, if there was evidence that tithes were not paid, that probably it would not be sufficient, but there does not appear to be one word to shew that the tithes were intended to be restrained with respect to that range of them, nor is that supplied by any subsequent evidence.

Then comes the ecclesiastical survey of the lands of the Abbey at the time of dissolution. It shews that the Abbey had lands in the *villa de Waghen*, and under the head of the Reprizes, it shews that 45s. a-year was due to the Chancellor of York. "*Cancellarium ecclesie Eborum annuati pro decimis de Waghen per compositionem xlvs.*"—certainly

tainly an expression large enough to shew that that payment covered all the tithes of the parish. If that was meant, it was egregiously wrong; for it only covered twelve oxgangs, as appears by the composition real, so that we cannot say that the whole of the lands in the *villa de Waghenam* were to be covered by 45s. a-year (although it could not avail the Defendants on this plea), for it clearly covered only that which was the subject of the composition. This furnishes another instance of that which we have often seen, that the Ecclesiastical Survey is not so very accurate in all its parts as might have been.

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Subsequent to the lease made in 1538, and after the Dissolution, there is a lease, dated 10th *March* 1635, by the Chancellor of *York*, as Parson of *Waghen*, (Doctor *Hudson*,) and *Edward Payler*, Esq. between himself, *John Wilson*, Clerk, and *Richard Wilcocke*, whereby, in consideration of the surrender of the former lease by the lessee, Doctor *Hudson* demised, and granted to *Payler*, and his heirs and assigns, all that parish church and all that rectory of *Waghen*, as described in former leases, and also all manner of tithe-corn, tithe-hay, tithe-lamb, tithe-wool, and other obventions ecclesiastical, &c. (in a similar manner, though the language is rather different from that used in former leases,) to be held for three lives. The rent is still 20*l.* a-year. We know that in those church leases the rent is always the same, a fine being paid on renewal. All this is confirmed by the dean and chapter. I observe, that by the answer of Sir *William Smyth* and his tenants, it is stated, that the Chancellors of *York* for the time being had

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had been in the habit of leasing out those lands for lives, to the owners of the lands belonging to Sir *William Smyth*, and that no tithes had been paid by such lessees with respect to those lands in *Waghen* which were part of the possessions of the Abbey, though great part of such lands have belonged and do belong to other persons besides Sir *William Smyth*. I have not seen any of those leases. They probably grant the tithes as the others did; but unfortunately there is no attempt made to point out those lands which the Defendants say belonged to the Abbey, I must however assume here, that the demise made first in 1488, which was repeated in 1538, which was renewed again in 1635, and has been continued to the present time to the owner of the lands, of which Sir *William Smyth* is not owner, granted those very tithes that are now demanded by the bill against those very persons who occupy the land, and who have had leases of those very tithes. How it is possible to contend in point of law that tithes are not due from those lands, when they themselves take leases of them for a number of centuries, I do not know; and it seems difficult to account for.

Then we come to the Parliamentary Survey 1649, which is after the lease from Doctor *Hudson*. It is headed generally—"Account of the rectory of "*Waghen*." It says, "the tithes of corn and hay, " wool and lamb, of the town and parish of *Waghen*, alias *Waywyn*, with the appurtenances, now " in the occupation of *John Wilson*, Clerk"—the name of the lessee in the lease of 1635, but whether that is the same or not does not appear—" and
Launcelot

Launcelot Rowley, are worth, *per annum*, 116*l.*;" and then the postscript sets forth the lease made by Doctor *Hudson*, and it states *John Wilson* to be the vicar of the parish.

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Now thus stands the case, so far as we have gone, as between the rectory and the Abbey. Those who represent the Abbey, Sir *William Smyth* and his tenants, took two leases of the very tithes which they say nobody was liable to pay, for that the lands were exempt. They take two leases themselves, which are produced. Their successor takes, in 1635, a lease, and those leases have been continued. As I do not see those leases themselves, I must presume they are in the same language or to the same effect, down to the present time, or till they were put an end to by the efflux of time, or other causes. The Parliamentary Survey certainly states that these tithes belonged to the rector. Thus stands the case as between the Plaintiff and the Abbey, or those who represent the Abbey, namely, Sir *William Smyth* and his tenants, without resorting to any collateral evidence. But it will be remembered, that in the year 1244, the time when the vicarage was created, all the tithes, except hay, lamb, and wool, were given to the vicar, and from the subsequent transactions we must presume the non-payment of the tithes of corn was because it was duly restored to the rector, if he was entitled to it at all, under some new arrangement. But the title of the Defendants as far as it is grounded on the perception of the vicar as being in possession of the tithes, would overturn the plea of prescription; the plea being that no tithes were payable within

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within time of memory, whereas there is no doubt that the vicarage was created long after the time of legal memory, and the rector was entitled to tithes, if any were due, before time of legal memory. If the vicar took any, it must be from the rector, and therefore such tithes must have been due since the time of legal memory. In the Ecclesiastical Survey, 26 *Hen. VIII.*, we find these words:—" *Vicaria de Waghen decimis minutis* " 64s." Then in the Parliamentary Survey of 1649, under title " The vicarage of *Waghen*," we find " The vicarage house, which, with the Easter-Book, and all the small tithes, we estimate to be " worth *communibus annis* 12l." Then there appears a long roll of terriers, giving the accounts of the vicar 1716, 1726, 1743, 1749, 1764, 1770, 1781, 1786, 1809, and almost to the filing of the bill 1817, in every one of which I believe is the following entry, " All minute tithes belong to the vicar " except lamb, wool, and hay." They do not affect the great tithes, or the composition due for line, flax, and hemp, during the incumbency of the present vicar. With respect to the township of *Meaux*, it is distinguished in the terrier from the parish in general. It is stated that " For the small tithes of *Meaux*, an old composition *per annum* 5s." So that beyond all doubt, as far as this evidence of the terriers goes, it appears that the township of *Meaux* was liable to pay tithes in some mode or other, as well as every other place. Those terriers are properly and regularly signed at the time by the churchwardens and the other parishioners. Therefore, upon looking at all the evidence from 1244 down to the present time,

time, I cannot doubt that the lands in the occupation of Sir *William Smyth*, are liable to the payment of all small tithes not excepting lamb, wool, and hay; for though I see no evidence of actual perception of the tithes, yet when I recollect that Sir *William Smyth*, and those whom he represents, were the lessees of the tithes, and that the lands of the Defendants occupied by them were his lands, and his property, it cannot be considered very surprising that no tithes should have been collected. That would of itself afford a sufficient reason for the reputation and the non-payment, because a lessee does not take the tithes in kind from the land which he himself owns: and it cannot be allowed to a land-owner to set up that in proof of a prescription in *non decimando*, for nonpayment of tithes. The lease, however, is alone decisive evidence as against him; but I must observe, that I do not find what would have been material evidence, if it existed that in fact any tithes had been actually rendered to the vicar; yet when I see that in the case of the Rector he reserved these tithes specifically to the religious House who owned those lands, I have a right, with respect to those who hold the lands now, to look at the terriers in connection with those leases if they wanted any confirmation, but I should have been glad to have known, whether in point of fact, the vicar ever did receive any of these tithes. The evidence of reputation as to Sir *William Smyth* and his tenants is, that no tithes were paid to the rector; but does not say no tithes were paid to the vicar. As far as I have been able to find in the statement of the evidence, it is merely, that no tithes were paid to the rector.

That

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That proves very little, because the rector had separated them from his own, and granted them to the vicar, and if paid to him, it was because tithes were due before the time of legal memory. Here the evidence of reputation as to Sir *William Smyth* and his tenants is, no tithes were paid to the rector, and it does not include the vicar ; and if tithes were paid to the vicar, the prescription must be destroyed, for he derives his title since the time of legal memory, having been appointed in the manner we have seen ; and with respect to the non-payment, as far as relates to Sir *William Smyth* and his tenants, it seems that those who owned those lands were the lessees of the tithes, and we cannot wonder that they demanded no tithes of their tenants, because by doing so they got an additional rent. Therefore the evidence of reputation, and all that depended upon it, which is always slight, does not operate against the mass of evidence produced against Sir *William Smyth* and his tenants. The result is with respect to the tenants of Sir *William Smyth*, I cannot—not only from the manner in which they have stated their case in the answer, but even from the evidence itself, if they were to reshape their defence—conceive it possible that they could maintain that they have the least pretence to insist on an exemption from the payment of these tithes.

It was said, with respect to Sir *William Smyth*, when I say him I mean all those who take the same line of defence, that the acts of his lessee cannot affect their lessor ; but that must be always stated with some allowance. It cannot affect him as between him and his

his tenants; but if any lessee had not received tithes from a stranger, between whom and Sir *William Smyth* there was no connection, it would perhaps, in that case, be a different matter, however in this case I cannot say that it is to be taken as evidence that those tithes were never paid; so as to give those Defendants all the benefit of the presumption arising from nonperception,

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With respect to *Meaux* I think the case is different, Many of the expressions in the leases, with respect to *Waghen*, may not include *Meaux*, and I find much difficulty in it. There is a payment of 5*s.* stated in the terriers to be due for the small tithes of *Meaux*; and whether that was ever paid or demanded, I do not know; there is no evidence of that, except in the terrier, and against that I see that nobody is proved to have paid tithes in the township of *Meaux*,

Upon the evidence of the terrier by which it appears the small sum of 5*s.* only has been paid for a great number of acres, I think that I cannot make a decree against the inhabitants of *Meaux*, without an enquiry in another place; but with respect to the tenants of Sir *William Smyth*, I must direct an account of tithable matters.

As to Sir *William Smyth* himself, the Bill must be dismissed against him, but as he has mixed himself up with the tenants, and put in an answer with them, and examined witnesses with them, I must with respect to the costs, follow the precedent that
 I made

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I made myself in the case of the Dean and Chapter of *Ely* (a). Therefore I cannot give him costs.

As against Sir *William Smyth* and his tenants,

Bill dismissed without costs.

As to the Defendants in the township of *Meaux*,

An issue directed to try the payment of 5s.

(a) *Leathes v. Newitt*. Ante Vol. 8. p. 562.

Friday,
 21st June.

The ATTORNEY-GENERAL v. DORKINGS.

Where a Defendant remained in custody under a *capias* on an information by the Attorney-General, executed whilst he was in prison on an arrest made without legal authority, and was therefore illegally detained, the Court discharged him from such custody by order made absolute on cause shewn by the Attorney-General.

TURTON obtained an order, on a former day in this Term, requiring the Attorney-General to shew cause why the Defendant should not be discharged out of the custody of the Constable of *Dover*.

The application was founded on an affidavit made by the Defendant, the substance of which was embodied in the rule, stating that the Defendant was arrested and taken into custody at *Folkestone*, in *Kent*, on the 15th of *May* last, by a lieutenant of his Majesty's ship *Severn* (whose name was unknown to the Defendant), employed in the Coast Blockade service, charged with having assisted in the unshipping of foreign silks, and was by him conveyed to a tower called *No. 1. Tower*, near *Folkestone*, where he was detained a close prisoner until the 18th;—that he was then forcibly removed on board a boat,
 and

and conveyed by another lieutenant of the said ship, whose name was also unknown to him, and a party of armed officers and men belonging to the ship, and landed near to the *Casement Barracks*, in the neighbourhood of *Dover*:—that from thence he was taken into the liberty of the *Cinque Ports*, at *Dover*, and there delivered over into the custody of Lieutenant *Philip Graham*, belonging to the same ship, and by him to the Constable of *Dover Castle*, under a warrant dated the 18th *May*, addressed to the Bodar of the Castle and *Philip Graham*, on a *Capias* issued out of the Court of Exchequer, upon an information filed against him by the Attorney-General;—and that the Defendant was thereupon conveyed to the prison of the castle of *Dover* aforesaid.

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It was also alleged, that the place where the Defendant was so landed, near the *Casement Barracks*, on the 18th of *May*, was not within the liberty of the *Cinque Ports*,—that the charge upon which the *Capias* was issued whereon the warrant was granted was for the same cause as that of the arrest on the 15th day of *May*, and not other or different;—that from the time he was so first arrested, as aforesaid, to the time of this application, the Defendant had been and was then remaining in one continued duress and imprisonment—and that he had not, during all the time before mentioned, been carried or conveyed before, or been subjected to any examination by, any Justice of the Peace whatsoever.

On

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On these facts stated to the Court, and the authority of the following cases, the rule was granted :—*Loveridge*, one, &c. *Plaistow (a)*, *Hall v. Roche (b)*, *Birch* and another v. *Prodger* and another, Bail of *D'Erval (c)*, and *Barlow v. Hall (d)*; in all of which the Courts discharged the party detained in custody on legal process, where the first taking had been effected without legal authority.

The Attorney-General appeared, in obedience to the rule, to shew cause; but having no affidavit to contradict the facts, he did not offer very strenuous opposition to the application: and without hearing *Turton* in support of the order,

The Court made the

Rule absolute.

(a) 2 H. Bl. 29.

(b) 8 Term Rep. 187.

(c) 1 Bos. and Pull. New Rep. 135.

(d) 2 Anstr. 461. and see *Lyford v. Tyrrel*. 1 Anstr. 85.

Friday,
 21st June.

HUGHES v. STIRLING.

A person being a housekeeper in Scotland, usually living in lodgings in London during six months of the year, is not admissible as bail in a civil action.

SIR W. Owen moved to justify the Defendant's bail in this case.

Jones opposed them, on the ground that one of them was a person living in lodgings in *Gray's-Inn-Lane*.

Time given in such a case to add and justify.

In support of the justification, it was shewn that
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the party was *a housekeeper in Scotland*. It was admitted that he usually resided, during six months of the year, in lodgings in *Gray's-Inn-Lane*; but

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The Court determined that he could not be permitted to justify, as it was necessary that the bail should be a housekeeper within the jurisdiction of the Court and the reach of its process. That person was therefore rejected.

The Court permitted the other bail to justify, and gave time to a future day to add and justify another.

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Wednesday,
26th June.

MOSELEY and others v. DAVIES, Clerk.

On a question of parochial *modus*, referred to a trial at law, testimony—offered as evidence of reputation, in proof of the custom on which the right to the advantage of the *modus decimandi* was founded, 'that the money payments constituting the alleged *modus* had been uniformly made, beyond living memory, and that the witness had heard old persons who at that time occupied lands in the parish, and were long since dead, say that it had always been the custom to make such payments,' was held to be admissible evidence of reputation on that subject, against an objection taken of interest in making such a declaration on the part of the deceased persons on whose information the evidence was founded.

BY decree of this Court, made in the original suit—for an account and payment of tithes in kind,—by bill in Equity, filed by the Defendant at Law against the Plaintiffs, the parties were referred to a trial at Law upon an issue, whether there existed such *moduses* as were set up by way of defence to that demand by the answers of the Plaintiffs at Law (the Defendants in Equity).

The *moduses* stated were *2d.* yearly for every day's math of hay, and so in proportion (&c.) in lien of the tithe in kind of hay, and *2d.* a cover for every cover of clover, and so in proportion (&c.) in lieu of tithe in kind of clovery early arising (&c.) upon the lands in the occupation of the Defendants in Equity (who were directed to be Plaintiffs at Law), within the parish of which the Defendant (at Law) was Vicar.

The issue was tried before Mr. Baron Garrow, at the Summer Assizes for *Monmouth*, 1821, when the Jury found a verdict for the Plaintiffs in the issue.

In the following Michaelmas Term, *Jervis* obtained permission, on motion for leave on the Judge's report coming in, to move for an order calling on the Plaintiffs to shew cause why the

On a mistrial of an issue directed by a Court of Equity, there can be no motion in arrest of judgment: such a motion being incompatible with the nature and object of the trial of issues in aid of a Court of Equity.

judgment

judgment on that verdict should not be arrested, or why a new trial of the issue should not be had at the next assizes. Leave having been granted on the grounds of the application,

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GARROW, *Baron*, now reported the evidence, and what passed on the trial at *Monmouth*.

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Tuesday, 5th
February, and
following day.

[The first alternative of the rule was struck out, immediately on the case coming on to be argued upon the Judge's report, as being wholly incompatible with the object of such issues, and the usage on trials of this nature.]

It appeared from the report, that it was stated by a witness of the name of *Rogers*, that he came to live in the parish fifty years ago; and that he had rented lands there for twelve years. He proved the mortgages in terms, and stated, that *he had heard old persons, who at the time occupied lands in the parish, and were long since dead, say, that it had always been the custom to make such payments.*

Upon that testimony it was objected by the Counsel for the Defendant, that the testimony of reputation which had been given by the witness, was tainted by interest on the part of the persons from whom the information proceeded, and was therefore inadmissible.

In answer to that objection, the decision of this Court in the case of *Harwood v. Sims (a)* was cit-

(a) Wightw. 112.

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ed : and on the authority of that case the learned Judge stated that he overruled the objection, which at the time he was disposed to think valid, and admitted the evidence which, but for that authority, his Lordship added, he should have rejected.

Jervis, Peake Serj^t. and Cross, in support of the application for a new trial, insisted, that—although such hearsay evidence is, in general, admissible in proving a custom, or any right founded on custom, which must necessarily depend much on the prevailing opinion respecting it arising from tradition, to shew that the common reputation has always been in favour of it, for which reason declarations of deceased persons are admitted—yet it is also a general rule, that the parties from whom such declarations proceed, should have no interest in the subject matter, which might bias their belief or influence the account given by them when they made such declarations. They therefore submitted that the evidence which had been received in this case was inadmissible, and ought to have been rejected on the objection which was taken at the trial.

They impugned the accuracy of the report of the case of *Harwood v. Sims* (from which it was admitted that the present case could not be substantially distinguished in circumstances) on the authority of which the objection was overruled, and the verdict probably obtained, as being directly contrary to that last principle of evidence. They urged that the case itself was very loosely reported, and could not be regarded as a deliberate determination
of

of the Court :—that the case, such as it was, did not in one view of it go far enough to meet the present objection; because from the statement it did not appear that the witness was an occupier, but it was objected merely that he was a parishioner; and then it is assumed that he was liable to pay tithes, and therefore an incompetent witness on a question of parochial modus; whereas he was not liable *quā* parishioner, and might in fact not have been liable at all, or only subject to a contingent liability. So that for any thing that appears from the report, the Court might, and probably did, say what is attributed to them in the printed statement of that case, as to the cutting up evidence of reputation altogether, by confining it in such a manner, without affecting the received principle, that declarations to establish a reputation must come from persons having no interest in supporting the common repute in that respect. In this case the evidence was the declarations of old persons, who were dead, who had been occupiers of lands, which made them directly interested in the subject matter of the reputation; and to determine that such declarations could be received in evidence, would be to make an anomalous case, and one which would conflict with the principle of all the authorities referring to *Peake's 'Evidence'* (b), and the cases cited there. Such a determination, they submitted, would have the effect of establishing that mere assertion was more worthy of credit than testimony on oath, and that what a man who was dead had said might be received as evidence, although whilst living he could

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(b) P. 15 and 17. (5th edit.)

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not be examined as to such matters if sworn as a witness on the same question.

They however admitted that there was no case to be found deliberately ruling this precise point either way : and they urged, that the question having now arisen, should be determined consistently with the known and established rules of evidence : and on those they insisted this testimony must necessarily be decided to be such as ought to have been rejected.

In the case of *Morewod v. Wood* (c), Lord Kenyon, laying down a general rule as to this species of evidence, said, that the practice which, he stated, prevailed upon his (the *Oxford*) circuit, of never receiving such evidence (general evidence of reputation) was best supported by principle. That was said, too, in a case where there was no imputation of interest against the evidence then under consideration ; and for that reason he thought it could not apply to private titles or prescriptions, and that it was only receivable upon general points, wherein *all mankind* were interested.

Martin, Taunton, Campbell, and Maule, in opposition to the application, urged, that, setting aside whatever authority there might be on the point, and taking it upon principle, the evidence which had been admitted in this case, and was now objected to, was admissible from the necessity of the thing ; for if the rule now contended for were to

prevail, there could be no longer any such head of evidence in the law as that of reputation, since almost all declarations as to the existence of rights founded on custom for the most part naturally proceed from the parties, either *lite motâ*, or from interested persons speaking of their rights; for if there were neither a suit instituted, nor any interest affected, such matters seldom or never would become the subject of mere conversation.

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The fallacy of the argument used on the other side, they submitted, proceeded from a confusion of the inherent qualities which distinguish reputation from evidence, as applied to the existence of facts. Reputation of a fact is the opinion of its existence expressed by persons who have heard it from others. Evidence of a fact is the positive testimony of it by persons who have themselves immediate knowledge of it. The existence of a reputation is itself a fact: and evidence of reputation is merely proof that there exists a received impression of the truth of some fact in the minds of persons who have heard it asserted. Parol evidence is the testimony of contemporaneous living witnesses; sworn to speak the truth in a court of justice, on the trial of a question *post litem motam*. Reputation rests on voluntary assertions of a received opinion derived traditionally from the declarations of persons no longer living, not on oath, made *ante litem motam*, and continued whilst there was no suit existing in respect of the subject matter of it. Interest destroys competency to give evidence, because evidence may be fabricated by a single witness; but
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it does not affect testimony of reputation, because reputation being a continuation of evidence from generation to generation, is not likely to be a fabrication. However false the evidence may originally have been, on which reputation be founded, and to which it owes its origin—and from whatever interested motive it may have been set on foot, the fact of there being such a reputation may nevertheless be true; and there must necessarily be some interest in many of those who assist it with such declarations as keep the tradition alive. This point must therefore depend on the question whether existence of an interest in persons, speaking of traditional matters, be destructive of the effect of reputation, and precludes its admissibility, or whether it should merely affect the credit due to it, as in many other cases where testimony is admissible in evidence, subject to the consideration of *quantum valeat*. They submitted, therefore, that whatever objection there might be to its weight, there was none which could so far affect it as to justify its exclusion.

It was then contended, that the admissibility of the sort of evidence now objected to was supported by the authority of determinations; for that this case was not distinguishable in its facts from that of *Harwood v. Sims*;—and that it was too nice a refinement, to affect that there was really a distinction between a parishioner *liable to pay tithes*, and an *occupier of land* in a parish: thus the statute for enforcing the repair of bridges, speaking of “inhabitants to be taxed,” is necessarily taken in construction

tion to mean such of them as are occupiers of lands. They also cited the cases of the *King v. the Inhabitants of Hammersmith* (d), and *Nicholls v. Parker* (e), as establishing that in questions of the boundaries of parishes, traditionary reputation is admissible evidence *ante litem motam*, or at least before there is any dispute respecting them, although the deceased persons on whose declarations the reputation rests, may at the time have an interest in the truth of the assertion. In the judgment of Lord *Kenyon*, in the case of *Morewood v. Wood*, the principle was admitted : it was the application of it to a private right only, which that learned Judge denied. They finally referred to manuscript notes of cases to shew that similar evidence had been often received on the Northern circuit.

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On the whole, it was insisted, that, both on principle and authority, the question of evidence which had been raised by the present objection was quite free from doubt: and that it was rightly received.

[When the case came on for argument on the second day, the Lord Chief Baron, who had been furnished in the mean time with a fuller note of the circumstances on which the opinion of the Court of Exchequer, as reported in *Wightwick*, was founded, took occasion, before the argument was proceeded with, to observe, that he had read the depositions of *Fruin*, in the cause of *Harward v. Sims*, and that he had there found, as was common in

(d) Peake's Evidence, App. XXIV. No. IV.

(e) 14 East. 331.

such

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such depositions, much that was not evidence, and could not be admitted. His Lordship also observed, that it was in these cases always necessary to see whether, independently of the objectionable evidence, there was sufficient to warrant the Court in decreeing an issue; for if that were so, the inadmissible testimony was of no consequence, and might be put out of the case. He stated, that in the present instance there was sufficient evidence to justify the direction of the issue, putting aside altogether the testimony of *Fruin*. Consequently his depositions became of no importance in the cause; and therefore the value of the *dictum* in the insulated portion of that case, which had been reported for this point, was very considerably diminished, standing as it did, not as a decision of the Court, but a mere *gratis dictum* in favour of a point, which higher authority than his own had not approved*.]

Jervis

* The following is a correct transcript of the depositions alluded to by the Lord Chief Baron, as taken in the case of *Harward v. Sims* :—

HARWARD v. SIMS.

The witness upon whose testimony the first objection arose, in this case (called *Harwood v. Sims*, in the report in *Wightwick*), was *John Fruin*, a farmer occupying lands in another parish. It appears from the depositions in the cause, in equity, which was by bill filed in 1806, that this witness, in his answer to the second interrogatory, stated,—“ that from 1792 to 1797, he was an inhabitant “ and occupier of land in *Marston*” (the tithes of which were the matter in dispute), “ and that during all that time he paid 3*d.* an “ acre half-yearly for all vicarial or small tithes, which he understood to be a fixed payment in lieu (&c.) ; because he had heard “ divers old persons, and particularly *John Loader*, who died a “ week or two ago, at the age of seventy-six, and who had all his “ lifetime

Jervis replied. At the close of the argument,

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The Court intimated, that under a consciousness of the prevailing difference of opinion amongst the Judges

"lifetime been an inhabitant of and occupier of lands within the said parish, declare that the said payment of 3d. per acre half-yearly (&c.) had continued and been made and accepted as long as he could remember, and had been an existing payment ever since the inclosure of the lands within the said parish, if not before." The witness also stated, that the said *John Loader* told him "that he thought the payment must be a modus, and that he" (the deponent) "had heard the same opinion expressed by other old inhabitants and farmers within the said parish."

It appears from the briefs of Counsel in the cause, that this evidence was objected to on the several grounds that it was evidence of a declaration by an occupier, and that it was not evidence of reputation, but of a particular fact—a payment by one person of a particular sum of money during a particular time only—unaccompanied by any evidence of an existing reputation, that it was payable generally: and that the Court determined it was not evidence of a modus, but of a particular fact.

The other deposition alluded to in the report in *Wightwick*, was that of *Thomas Lake* to the second interrogatory. It was in these terms, differing somewhat from what is stated in that report:—That "he had heard from old inhabitants now dead, and whose names he did not recollect, that the yearly sum of sixpence an acre, and no more, was always paid in lieu of small or privy tithes in their time, without any alteration."

SIMS v. HARWARD.

Coram *Le Blanc*, N.P. *Oxford*.

Summer Assizes, 1811.

Upon the trial of the issue, which was afterwards directed, the first witness examined on the part of the Plaintiff (at law) in the cause, was *John Fruin*, who gave the same evidence as he had given

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Judges, both in other times and now, it would be fit that the Court should have an opportunity of conferring together, and with other Judges.

[The Lord Chief Baron also stated, that he was desirous of saying, that whatever might be the ultimate decision to which the Court should come in giving judgment in this case, all the authority of the report in *Wightwick*, of *Harwood v. Sims*, was, by the investigation which had taken place in the course of the present discussion, entirely blown away as a determination, and consequently that it now stood as merely a *gratis dictum*,—an opinion expressed in the course of argument, without the deliberate consideration necessary to make it a binding decision.]

Cur. adv. vult.

Wednesday,
 26th June.

The Court now delivered judgment seriatim.

RICHARDS, *Lord Chief Baron*.—The question in this

given in his depositions. On cross-examination, he stated, that *Loader*, from whom he had heard the declarations, was an occupier of lands in the parish.

No objection was taken at the Bar, or by the learned Judge who tried the cause, Mr. Justice *Le Blanc*, to that evidence.

Other witnesses were also examined at *nisi prius* on the part of the Plaintiff in the issue, (the Defendant in Equity), who stated, that they had been informed by their immediate ancestors, deceased, who had been occupiers, that the payment, as stated in setting out the modus, had always been customary.

this case is, whether the evidence which was received on the trial of the issue at *nisi prius* was properly admitted. The evidence offered was what is termed evidence of reputation.

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[His Lordship stated the evidence on which the question arose, the objection, and the circumstances under which the objection was overruled by the learned Judge.]

We have looked into the circumstances of the case in *Wightwick*, and find that the opinion of the Court was not given judicially on this point. Indeed the question could only have arisen incidentally there, as the real subject matter of discussion was of a very different nature. The questions before the Court were, whether there was a modus of 2d. an acre payable in lieu of small tithes? and if there were, whether that modus was not rank? The contest was, whether there ought to be an issue? and the Court were of opinion that there was so much evidence given in the whole case on both sides, as to render a further enquiry necessary.

There have been many cases, certainly, wherein this sort of testimony has been received; and therefore we are told that there is no doubt about the admissibility of the evidence in this case; but that by no means follows. I am certainly not aware, I confess, of there being the authority of any decided case against it, but I am quite sure that there have been many within my own personal experience, in
which

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which such evidence has been withdrawn on an objection being successfully made to its admission. The question is therefore certainly one not without considerable doubt, because there have been what may be called practical determinations both ways. There have been long, on the contrary, very grave and serious doubts entertained on this question by Judges in former times. We find them expressed in the books; and on conversing about this very case, with other learned persons, I find that there exists at this moment very great doubt on this point which has been now brought before us for our decision.

On the whole, the opinion which I have ultimately formed upon it is, that such evidence is admissible. If it were not, evidence of reputation must certainly in most cases be necessarily rejected, on the ground of the persons making declarations respecting it being generally interested in the subject. It would even be necessary to specify in that case upon all occasions from whom the witness had heard the declarations, that it might be shewn whether they were or were not interested in making such declarations. That again would be, in by far the greater number of cases, impossible, as the names of persons who have long ago been dead, by whom declarations respecting particular topics of common repute have at some time or other been made, are mostly forgotten. Nothing is more common, as we all know, than to remember the substance of a communication, when we are no longer able to recollect from whom we received the

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the information. (The party producing evidence of reputation, therefore, is not driven to shew that the persons from whom his witness derived his information had no interest in the subject which was the matter of reputation.) It may and does frequently happen, also, that such reputation may be spoken to by persons who accidentally heard it, and who were strangers to all parties; and if there were no *lis mota* to induce conversation on such topics, evidence of the declarations of such persons would be undoubtedly admissible. It is often the case, that persons speak of matters of rumour with as thorough a belief and conviction of their truth, as of the sun giving light in the day; and it mostly happens that such generally received notions are well founded. They therefore ought not to be shut out from being admitted as evidence; and indeed to a certain extent, they are frequently of great weight and effect in the investigation of the truth of matters in dispute. I am therefore of opinion, that such evidence ought not to be excluded on the objection of there being an interest in the persons through whose medium the matter of reputation has been obtained.

That is my view of this question. Persons having a direct interest in the result are certainly not proper persons to produce as witnesses on a trial, because they might speak falsely, from interested motives, where the immediate consequence must affect themselves, and yet the same persons, when no suit might be in contemplation, having no immediate reason for misrepresenting the fact, having no interest at the time which their statement could promote

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promote or prejudice, would very probably tell the plain truth. If, in a case of this sort, interest in the persons speaking of the matter in question were to destroy the effect of what they asserted, you could never inquire on the spot for evidence of reputation; and if you could not produce it from thence, from whence could it be produced at all? Suppose a stranger should state as a witness, that he had long ago heard in the vestry-room a conversation, respecting the origin of a given custom, between the clergyman and some of his parishioners, wherein the parishioners, some of whom were since dead, asserted the ancient existence of a custom which it was the interest of the parish to maintain, a parochial modus, for instance, and that the origin was not remembered or known in the parish, and that the clergyman did not say any thing to controvert it, surely that circumstance would be admissible evidence to prove that there was an understanding in the parish that such a custom existed; and if such evidence were to be rejected because the witness could not state the names of the persons who made the assertion, or because they might be or actually were interested in the question, there could be no evidence of general reputation given in any case.

Upon due consideration of all the consequences likely to result from determining this point either one way or the other, and deferring also to an *intimation* of the opinion of persons sitting as Judges in this Court—and the case in *Wightwick* certainly amounts to nothing more—persons consequently
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in the habit of weighing the value of evidence, and determining on its admissibility, I incline to think, upon the whole, that my Brother *Garrow* was right in admitting the evidence, notwithstanding he received it against the opinion which he himself entertained at the time in favour of the objection taken to it at the bar. The consequence of that opinion is, that I must say that there is no reason for granting a new trial in this case.

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GRAHAM, Baron.—This is undoubtedly a most important question which we are now called upon to determine: and it is one which is constantly recurring in all tithe causes at *nisi prius*; it therefore loudly calls for a solemn decision one way or the other.

The objection appears certainly *primâ facie* to be a very plausible and good objection, but when well considered and thoroughly investigated, as it has been in the course of the argument in this case, it must be seen that it is an invalid objection.

Evidence of reputation is in its nature loose, and liable to error: and it has been occasionally found to be, in particular cases, somewhat unsatisfactory; but it is nevertheless evidence; and it is sometimes of the utmost importance to parties, for it is often the sole support of many important rights, as in copyhold interests, for instance. A link of traditionary evidence is sometimes capable of being pursued through generations of persons interested, with astonishing accuracy, as we sometimes see in questions of pedigree

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gree and legitimacy, and more especially in boundary cases. Indeed it would not be totally inapplicable on this point to suggest, that some of the most sacred and important truths we know—those by which our conduct as Christians should be regulated—depend materially on evidence of this description, and are derived to us from tradition.

The main qualification which is necessary to evidence of reputation, to render it admissible, is the absence of the *lis mota*. The distinction between such evidence offered *ante*, and *post litem motam*, was well laid down and marked out in the *Berkeley* Peerage case (c), in the House of Lords. Freed from that bias, it has always been considered, that information transmitted from father to son was admissible evidence on certain questions in Courts of Justice, leaving the value of it in all cases to be weighed by those whose province it is to estimate it.

The distinction is certainly very plain and clear, between what a person may happen to have said in this manner as to a particular circumstance, of the truth of which he is, in common with many others, convinced, and in speaking of which he can have no view to his own interest, as the relation could not advance or injure it, and what he would say if examined on oath in a Court of Justice, on a trial, in the consequences of which he has an interest, as to a fact within his own knowledge, and the truth

(c) 4 Campb. 401.

of which he might be disposed to conceal or pervert, as the result might be injurious or beneficial to him. In the latter case, the principle of exclusion is clear and universal, without any exception; but if, in the matter of evidence of reputation, we exclude all information derived from sources where an interest exists, we should leave but a very small portion of such evidence admissible in any case.

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It has been urged, that there is no reason why what has been said by a man who is dead shall be received as evidence, when the man himself could not have been examined as a witness to the fact of which he speaks, if he had been living. The reason, in truth, is still the absence of opportunity and motive to consult his interest, on the part of the speaker, at the time. Whatever secret wish or bias a man may have in the matter communicated, there is no excited interest called forth at the time in his breast, or at least no means are afforded, of promoting, or danger incurred of injuring, any interest at the time, nor can any such be the necessary result of a communication so made, whereas on a trial, in itself of necessity directly affecting his interest, there is a double objection to admitting his evidence, in the concurrence of the temptation of interest and the excitement of the *lis mota*.

For these reasons, I, for one, am clearly of opinion that this evidence was admissible, and ought not to have been rejected, and principally because if that be not so, all traditional evidence must be totally destroyed.


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WOOD, *Baron*.—I am of the same opinion. In general, it is a clear principle, that hearsay evidence cannot be admitted. Evidence of reputation in matters of custom is, however, an exception to that general rule; but, in order to be received, it must be supported by proof of the declarations as to such custom, having been made before any suit has been instituted in respect of the custom, or any dispute or controversy agitated, of which that custom was the subject; and that is the only restriction imposed on the admissibility of such evidence, that I know of. The reason of that restriction is, that the party may otherwise have the particular suit in view, as the object of making the declaration respecting the custom on which the right about to be litigated may mainly depend.

It must also be remembered, that to make evidence of declarations, respecting the reputed matter, admissible, it must further be proved that the declarations establishing the reputation, and the acts done in consequence, were the result of a received reputation, for either, standing alone, would only be hearsay evidence, or evidence of a particular fact: and the principal use of evidence of this sort is to shew that the act done or declaration made was not a new thought adapted to serve some particular occasion, but the consequence of a received notion of the existence of a custom requiring the performance of the act, and accounting for or explaining it by such declaration. Such evidence should be always general; and as it is in all cases, when resorted to on questions of custom, used merely to shew that
such

such a custom in fact existed, and from a period beyond legal memory, or at least as far back as living memory goes, it has never been the practice to inquire whether the persons from whose declarations the witness speaks were interested or not.

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I am therefore of opinion, that there was in this case no foundation for the objection which has been taken to the admission of the evidence given on the trial of this issue, notwithstanding it appeared in point of fact that the persons who made the declarations on which the evidence of reputation was founded, were interested in the subject-matter, and that those declarations were calculated to support their interest.

GARROW, *Baron*.—When this objection was taken on the trial of the cause before me at *nisi prius*, my impression certainly was, that it ought to prevail; and accordingly, I should certainly have rejected the evidence, but for the authority of the case of *Harwood v. Sims*, which was cited upon that occasion. As it has turned out, it was better that I should have received the evidence, otherwise there must have been a new trial.

My opinion on this question cannot now be of any importance in the present case, because the majority of the Court have already determined the question; and even as opposed to that of any one other member of the Court, I should hold my own opinion as nothing. We had discussed this point amongst ourselves, in order that an unanimity of opinion might

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might if possible be the result ; and I have certainly been very much struck with the arguments and able reasoning of the rest of the Court—so much so, that I do not desire that this may not be considered as an unanimous judgment. It sometimes happens, that when our judgment yields, our minds continue to be somewhat obstinate in refusing to part with first impressions. The difficulty which I originally had, I feel, still continues to disturb my entire acquiescence, although if, on any future occasion I should be called on to rule this same point judicially, that feeling will have no influence, however much and forcibly early habits, and an apprehension of the uncertainties attending the efforts of human memory, relying on recollection in respect of hearsay of every description, whether there should exist a pending litigation or not, may have impressed my mind with a dread of the danger of receiving such testimony. At all events, be one's private opinion what it may, the doubts which I may have entertained must give way to the judgment of the Court ; and it will necessarily follow that this application must be refused.

Rule discharged.

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Friday,
21st June.

THIS was an information against the Defendant, a brewer, for certain alleged frauds in mixing table beer with strong beer contrary to the statute of the 42 Geo. III. c. 38. s. 12*. The Crown took a verdict on the 4th, 6th, 7th, 12th, and 14th counts of the information.

A Count on the 42 Geo. III. c. 38. s. 12., stating that the Defendant between the 21st day of October, 1819, and on each and every of divers, to wit, twenty other days, between that day and the day of exhibiting the information did mix a large quantity, to wit, 12 gallons of strong beer, with a large quantity, to wit, 12 gallons of table beer, in each and every of divers, to wit, five other casks, whereby, &c. the Defendant had for each of the said offences forfeited the sum of 200l., amounting in the whole to 21,000l., held

Jervis now moved in arrest of judgment on an objection taken to the 14th count, on which the verdict was taken for eleven penalties, in that it was contrary to the practice and usage to take a verdict on a count for accumulated penalties, admitting that it was the common practice to introduce such a count in informations of this nature.

That Count stated "that the Defendant being such brewer as aforesaid, after the said first day of May, 1802, and before the day of exhibiting this information, to wit, on the 21st day of October,

to be a good count against the objections that it was cumulative and multifarious, being a single count for many penalties,—that the divers other days on which, &c. ought to have been specified and stated,—that the charge was uncertain and unintelligible, or repugnant,—and that from the calculation of the amount of the sums alleged to be forfeited, it appeared that the Defendant was charged with five offences on each day, whereas he could not in point of law be considered to have committed more than one offence on each particular day.

In penal informations filed in this Court by the Attorney-General, ancient precedents are considered good authority for the form of particular counts.

* That section enacts that, "If any common brewer shall at any time mix, or cause, or suffer to be mixed, any strong beer, or strong worts, with any table beer, or any table beer worts, or with water, in any vat, cask, tub, measure, or other vessel or utensil whatsoever, not being a known and entered guile tun, working tun, or fermenting tun, every common brewer so offending, shall for each and every such offence forfeit the sum of 200l."

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1819, *and on each and every of divers, to wit, twenty other days, between that day and the day of exhibiting this information, to wit, at Westminster aforesaid, in the said county, did mix, and cause, and suffer to be mixed, a large quantity, to wit, twelve gallons of other strong beer with a large quantity, to wit, 24 gallons of other table beer in each and every of divers, to wit, five other casks, such last mentioned casks not being, nor either of them being, a known and entered guile tun, working tun, or fermenting tun, contrary to the form of the statute in that case made and provided, whereby, and by force of the statutes in that case made and provided, the said Defendant so being such brewer as last aforesaid, so offending as last aforesaid, hath for each of his said last mentioned offences forfeited the further sum of 200*l.*, amounting in the whole to another large sum of money, to wit, the further sum of 21,000*l.**

The objections now taken to that count were,

1st. That it was a single count for many penalties, whereas each separate offence ought to be made the subject of a separate count :

2dly. That the days on which the supposed offences were charged to be committed were not, with the exception of the first, specified in the count :

3dly. That the offence itself was not charged or stated, with sufficient certainty, the allegation that
 the

the Defendant mixed a certain quantity on several days being wholly unintelligible and even repugnant: and

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Lastly, That the conclusion as to the amount of penalties did not follow from the premises, the offences charged having been stated to have been committed on twenty days, and were alleged to amount to 21,000*l.*; whereas in fact they would amount to 4000*l.* only, as there could not be more than one offence properly charged to have been committed on one day.

The *Attorney-General*, *Clarke* and *Walton* shewing cause, submitted as to the first objection, that there was no case to be found which would support it in Law or Practice, and urged that it was not founded on any principle of hardship or inconvenience—that on the contrary it would be much harder on the Defendant, and less convenient to his defence, to accumulate the number of counts in the information, as that course would be in all respects as uncertain and vague as if a number of offences, or days on which offences had been committed, were charged in one single count, a mode far less intricate and expensive as affects the Defendant, than by endlessly accumulating counts, and swelling the record in cases of the Crown, where costs are never given. It was also urged that the practice and usage of the Court, and the accustomed form of pleading in such cases, sanctioned the count as framed in this instance, as would appear by the records; and they adverted, particularly,

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particularly, to the cases of informations for illegal possession of salt, which was liable to penalties at a rate of 40s. per pound.

The answer of usage so given to the first objection, it was submitted, would be, to a certain extent, an answer to the second which had been made, as the same principles and reasoning would equally apply to that also. It was further submitted as to the second objection, that it was not necessary in the case of a penal information, to specify the day or days on which the offence or offences were charged to have been committed: and the reason was that the Crown would not be bound by a statement of any given day, if the offence charged should be proved to have been committed on some other day (*a*). On that point the Counsel for the Crown cited the authority of the case of the *Queen v. Simpson* (*b*), where it was determined, on a conviction for deer stealing, that the day need not be stated, and that it was well enough to lay it between such a time and such a time, on the authority of the case of the *King v. Chandler* (*c*), where it was said to be *the constant course of this Court*, so to lay offences in penal informations. They also cited the case of *Reed qui tam v. Francia* (*d*), as a very strong case on the same point. They instanced also the common form and course of convicting for several oaths, uttered on the same day, and it was stated at the bar that the

(*a*) The Attorney-General v.
Weeks. Bunb. 224.

(*b*) 10. Mod. 249.

(*c*) Ld. Raym. 581. Salk.
378. S. C. and Carth. 501. S. C.

(*d*) Bunb. 42.

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practice of naming any particular day in Excise informations, had been first adopted in pleading by Sir *Vicary Gibbs*, and that it was not adopted in the customs. In the *Attorney-General v. Hatton (a)* also, which was an information for duties on goods imported in *May*, without naming any day, this same objection was overruled, the Court holding that several importations might be proved where one only was laid. They referred, in conclusion, to the practice of pleading in cases of ordinary trespasses, which were commonly laid to have been committed on a certain day, and divers, to wit, twenty other days.

As to the third objection, of uncertainty and repugnancy, it was insisted that the charge was sufficiently defined by the allegation, which in grammatical construction was perfectly intelligible, as applying to distinct offences on each given day.

Upon the point of miscalculation of the amount of the penalties charged to be incurred, they contended that it was quite sufficient that the sum for which the verdict had been taken should be within the amount; but they urged, further, that as a penalty was imposed upon every cask, and as the illegal mixing had been charged to have been made in five different casks, on each separate day, the total amount would be that charged in the count. In anticipation of the proposition on the other side, that the illegal conduct of the Defendant on each particular day, would amount in law

(a) Bunb. 262.

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to only one offence on that day ; they distinguished the present charge from that in *Crepps v. Durden* (a), which case they assumed would be relied on for the Defendant, by putting it that the offence there was not the baking a loaf on Sunday, but for a breach of the Sabbath ; whereas, here the offence was not for illegally mixing beer generally, but for repeated mixtures of several quantities. And they cited on that point the case of *Brook qui tam v. Milliken* (b), where it had been held against the objection now made, that two penalties may be incurred in one day by offences against a statute, *if the acts be distinct*.

They therefore submitted that there was no foundation for setting aside the verdict on the grounds relied on by the Counsel for the Defendant.

Jervis and Sir *William Owen*, in support of the Rule, contended that the count objected to was bad ; for that it was inconsistent with the principles and practice of pleading, being cumulative and multifarious, and bad for duplicity, uncertainty and repugnancy : and they insisted that the mere course of practice of the Excise was no argument in its favour, nor could it be considered authority, unless it had come under the notice of the Court.

As opposed to such alleged practice, they cited the following authorities :

1st. To shew that for each separate offence, there

(a) Cowp. 640.

(b) 3 Term Rep. 509.

should

should have been a separate count; they referred to the language of Mr. Justice *Grose*, as to the converse of the proposition in giving judgment in the case of *Young* and others v. the *King* (a). And they cited as directly in point, the case of the *King* v. *Roberts* (b), where in an *information* for extortion, it was determined that every extorsive taking was a separate offence, and ought to be precisely and distinctly laid, for that a number of offences could not be accumulated under a general charge. In *Michell* v. *Neale* (c) it was held to be ill, even in a *declaration* for an assault laid that the Defendant assaulted Plaintiff on divers days, between such and such a day.

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2ndly. To shew that the days on which the specific offences were charged, ought to have been mentioned and fixed by the information; they cited *Hawk, Pl. Cr.* Vol. II. ch. 25. sects. 77 and 82. In the 77th sect. it is said to be laid down as an undoubted principle, recognized in all the books, that "no indictment, whatever, can be good without *precisely* shewing a *certain* year and *day* of the material facts alleged in it." In the 82d sect., it is said that "if an indictment charge a man with having done such a nuisance, such a day and year, &c. *and on divers other* days, it is void as to the facts on those *days which are uncertainly alleged.*" And it is also stated that "if it charge a man generally, with several offences, at several times, without lay-

(a) 3 Term. Rep. 106.

389. S. C. Holt. 363. S. C.

(b) 4 Mod. 103. 3 Salk. 198. Ld. Raym. 475. Stra. 1161.

S. C. Carth. 226. S. C. 1 Show. (c) Cowp. 828.

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ing any one of them on a certain day, as with extorting divers sums of divers subjects, for a passage over such a ferry, &c. *between such a day and such a day*, it hath been adjudged that it is *wholly void*." The express reason is given by the learned Serjeant in a note, and it is "because every extortion is a separate and distinct offence, requiring a separate and distinct punishment, which could not be apportioned if distinct offences were accumulated under a general charge," and he prefers the authority of the case of the *King v. Roberts (a)*, to that of *Johnson's case (b)* which appear to be determinations not reconcilable. They also quoted *Hale's Hist. Pl. Cr.* ch. 25. p. 177, to the same effect. With respect to the cases relied on in opposition to this objection, of the *Queen v. Simpson*, and the *King v. Chandler*, they submitted that those were not deliberate decisions on the point, but mere *dicta* founded on a bad reason for making law, *the practice*, whether proper or improper, in the *Court of Exchequer*, of drawing informations in this form. In the case of the *Attorney-General v. Hatton*, the Defendant had had *a note* of the times of the importations charged against him. A penal information of this description they insisted ought to be framed, with the same certainty as an indictment. That these informations were in the nature of criminal proceedings, appeared from proclamation being made in respect of them as in criminal cases: and they observed that they are, by the 46 *Geo. III.* ch. 37., expressly distinguished from *civil* suits at the instance of the King. They ad-

(a) 4 Mod. 101.

(b) Cro. Jac. 611.

mitted

mitted that it was said by Mr. Serjt. *Hawkins* that a different Rule prevails as to convictions, but these informations are more analogous with indictments before trial than with convictions.

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3dly. In support of the objection of uncertainty in charging the penal act, they urged that the offences meant to be charged, were not set out in terms with sufficient certainty and precision, to constitute a distinct breach of the law, within the purview of the statute : and still less, so as to constitute several distinct breaches of the enactment. The penalty is not imposed on the mixing per cask, or per day, but on mixing generally, and it is not competent so to divide the offence of mixing, as has been attempted to be done in this count, by stating it to have been done on so many days, and in so many casks. The mixing, for any thing that is stated, appears to have been only one mixing, and whether it was one single act on each and every day, or several acts on each and every day, does not appear, from the loose mode in which the act is alleged, to have been done. Charging that the Defendant mixed a large quantity, they also submitted was too vague pleading to be allowed in framing an information on a highly penal statute, and that it was not made sufficient by the quantity afterwards being stated under a *videlicet*, which cannot supply a defective statement. Upon that part of the objection they cited the following authorities, to shew that the precise quantity ought to be ascertained and stated : an anonymous case

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case in *Cro. Car.* (a); the *King v. Gibbs* (b); and the *King v. John Gilbert* (c).

Upon the last point made, they insisted that more than one offence could not be committed within the terms of this statute in one day, by mixing strong beer with table beer. That was settled by the case of *Crepps v. Durden* (d). Like the act of breaking the Sabbath, the act of mixing a quantity of beer on a given day could not be divided, whereas, on the contrary, the offence that gave rise to the case of *Brooke v. Milliken*, which was that of selling prohibited books, might be often repeated during the same day, and on that ground they distinguished the cases. Here the offence was the mixing beer generally, not the mixing a cask or casks of beer, which like the case of the sale of books might be repeated. They also submitted that according to the sum laid in the information, as the amount of the accumulated penalties alleged to have been incurred, it would be necessary to shew, in order to support that charge, that the Defendant had committed five offences on each of the twenty days, making the amount 21,000*l.*, but that if the doctrine of the case of *Crepps v. Durden* were correct, the amount of penalties incurred ought to have been laid at 4000*l.*, and in that latter case there ought to have been a several count for each distinct day, on which

(a) *Cro. Car.* 380.(b) 1 *Stra.* 497.(c) 1 *East. T. R.* 583.(d) *Cowp.* 640.

each

each distinct offence was charged to have been committed.

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For these reasons, therefore, they submitted that unless the Crown would consent to take a verdict, on the 14th count, for one penalty, the judgment on that count ought to be arrested.

The *Attorney-General*, in reply, insisted that it would be quite a sufficient answer to all the objections which had been taken to this 14th count of the information, to rely on the established usage and practice of the *Court of Exchequer*, in drawing and acting on informations so framed, and which has never yet been successfully objected to. That answer has been judicially furnished by the repeated authorities of the cases of the *King v. Chandler*, and the *Queen v. Simpson*, which recognized the practice of the *Court of Exchequer* in this respect, as an authority by which the Courts were bound. In the *Attorney-General v. Farr (a)*, also, this Court had determined on the same ground—the practice of this Court—in favour of an information against the form and terms of which an objection in point of pleading had been made: and the *Lord Chancellor* had very recently declared in the *House of Lords*, on the determination of a great question there (*b*), that precedent and practice ought to have great weight in the consideration of

(a) 4 Price, 122.

the Earl of Jersey*.

(b) *Smith v. Doe*, lessee of

* 7 Price Exch. Rep.—Brod. and Bingham and Moore. S. C.

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all points arising upon the propriety of forms, and in all legal instruments.

As precedents of similar counts, he referred to the books of pleadings mentioned in the margin*.

As to the authorities referred to in support of the objection that the offences were distinct, and should each have been made the subject of a separate count, he distinguished them from this case, not only in that an information for penalties in itself was a distinct matter from an indictment for an offence; because it is partly civil and partly criminal, but also by the reasons given for requiring the offences to be separately charged in an indictment, which are that punishment might be proportionately awarded. That doctrine, therefore, could not be applied to informations for fixed penalties, with respect to the amount of which there could arise no doubt, as it did not lie in the discretion of the Court.

So with respect to the objection of the uncertainty of the quantity of beer mixed. In the case cited on the part of the Defendant, the *King v. Gibbs*, which was an *indictment* against the Defendant for selling beer in unlawful measures, the same reason is given that the Court without knowing the quantity sold would not know in what degree to punish him. In this case too, the offence

* Rast. Ent. 410. Hern's Pleader 549. 507, 508. Winch. Ent. 541. 547. Thompson's Ent. 92. Brown Form. Plac. 50. 251. 260. 250. 252. Vidian. Ent. 186. Coke, Ent. 158.

consists

consists not in the quantity mixed, but in the act of mixing. That consideration also distinguishes this case from that of *Michell v. Neale*.

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As to the last objection, it was insisted that this case could not be distinguished from that of *Brooke v. Milliken*, if it could be proved that the mixings, though on the same day, were distinct. With respect to the sum laid in the information they submitted that that was very immaterial, provided the penalties proved to have been actually incurred, were within the amount of the sum laid.

RICHARDS, *Lord Chief Baron*.—I am of opinion that this count is according to the established course of the Court. I think the *Attorney-General* states very truly, that there never was any objection made to it before, and I have the authority of a very experienced and learned person for saying that this mode of pleading has always been the course during his time, and he has been very conversant with these proceedings on the part of the Crown in this Court. During the time that I have had the honour of a seat here, I have always found this count introduced in every information which has come before me, wherever it could be properly inserted. On that ground, therefore, in the first place it being according to the accustomed course of the Court, I am not prepared to alter it. Another consideration with me is, that I think it is infinitely more useful to continue the old practice, than to introduce a new practice in my opinion less certain and more vague, and which never existed

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existed before ; for I am quite sure that it would be a most injurious thing to Defendants proceeded against for transactions of the nature described here, to change the old practice for such an innovation as is now proposed.

Now with respect to the sense of the count, it seems to me to be perfectly clear. It is stated that on a certain day, and on several, to wit, twenty other days, and between that day and previous to the day of exhibiting the information the party did so and so. In some of the cases we find it has been held to be not necessary to specify any number of days. Here a certain number of days are specified, and they are so pointed out as that they may easily be found, being said to be between a day certain, and the time of the exhibiting of this information. This count, therefore, in that respect seems to me to be right in point of form, even if it were not supported as it is by the constant practice. With reference to the cases in other Courts, if any of those cases differ from the practice here, is not for us now to settle which is right.

As to the other objections which have been taken, it is sufficient to say, there is no foundation whatever, for any of them in my opinion, and I therefore have no hesitation in saying that I think this rule should be discharged.

GRAHAM, *Baron*.—I shall say but very little in support of my opinion, which fully coincides with that of my *Lord Chief Baron* ; because much better reasons

reasons will be given by my brother *Wood*, who has had great experience in such cases. As far, however, as common sense can enable any man to decide upon pleadings, I am clearly of opinion this count is quite correct in point of form, and valid in point of law. I will also say this much. I think that the *Attorney-General* is perfectly right when he says that these proceedings for penalties here, are although partly of a criminal nature, for many purposes to be considered as in the nature of civil actions; they bear in many respects an analogy to the common cases of trespass, where counts of this sort are universally resorted to. Their propriety is strongly fortified by the universal practice of this Court in which they seem to have been adopted from a very remote period. Now really that an argument affecting to rest upon popular grounds should be used against this count, does strike me with some degree of surprise. The object of the count, evidently, is to relieve those persons who stand in the unfortunate situation of Defendants in these cases from all that inconvenience of accumulating counts and thus unnecessarily lengthening the pleadings and increasing the expence, which have been constantly made the subject of repeated reproaches cast upon the persons who have from time to time had the direction of the prosecution of these suits. The argument of the Defendant is, that mixing up beer being made the subject of penalty, it is expected that every offence into which a series of bad practices of the same kind can be divided, should from one

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period to another, committed not only daily but hourly, for so it may be committed, is each to be the subject of a distinct count in the information. If that doctrine were to be acted upon, I should be taking up the time of the Court uselessly to attempt to detail the absurdity and inconvenience of it. It is quite enough to present it to the mind to shew that it is a proposition too glaringly insupportable to be entertained seriously for a moment. Then it is said the party is bewildered by this multifarious count. Would he be less so if he had a hundred and five counts to answer instead of this one?—for that would be the consequence.—How is he bewildered here? It is clear if these offences had been stated to have been committed each on a certain single day or hour, that by such a mode of pleading as laying in many different counts these distinct offences as so many committed upon each day—so many upon one, so many upon another—the Defendant would be in a much worse situation; for the Crown might still, on any or either of those counts, have given in evidence as many distinct offences under each count as could have been proved against the Defendant.

Having so decided an opinion as I have against the solidity of all these objections, I do not feel at all disposed to enter into them more particularly. I will observe, however, that there can be no doubt that by the use of the words “*a certain quantity*,” it is meant to apply them to a given quantity of beer, mixed on every day of the twenty-one, and that ob-
servation

servation appears to me at once to get rid of that objection. Upon the whole, therefore, I think this count is perfectly legal in form and substance.

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WOOD, *Baron*.—This count has been in constant use for a great number of years. Therefore, I am not for altering it as an established course and form of pleading, unless there were some insuperable objection to it. It appears to me there is no objection to it, because this count gives as much information to the Defendant, of what he is to answer, as if there had been one hundred and five separate counts. This count alleges that on the 21st day of *October*, and twenty other days, between that day and the day of exhibiting the information, the Defendant mixed &c.—so that the number of days is ascertained, and the Crown cannot go beyond that number of days, or out of the period limited by the first and last. Therefore the Defendant is informed by this count that the offences he is charged with, were committed on one day, and on twenty other days, between such a time and such a time, limiting the time occupied by the offences charged, and giving him as much information as if he had had twenty-one distinct counts. Suppose it had been put that he committed one offence on the 21st day of *October*, one offence on the 22^d, another on the 23^d, and so on, would he have been any the wiser for those separate counts? Not in the least, but he would have been put to a great deal more expence: and we should have had a complaint that this unnecessary multiplication of counts was oppressive upon the subject. The short answer to

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the objection still is, that this count gives him just as much information as if there had been several different counts ; so that with respect to the event he has the same information as if there had been separate charges.

Then another objection has been taken, and that is, that the mixing is only charged in one quantity, whereas, one entire quantity cannot be mixed upon twenty-one different days. Supposing we were to admit that, we are not to look at the facts of the case, but only to what is alleged in the count. Then take it in that way, that he mixed in twenty-one days one entire quantity, the Crown have only taken eleven penalties, and as there is no objection to that on the face of the count, we cannot search for objections among the facts. So that supposing he did in twenty-one days mix an entire quantity, or an entire quantity on each of those days, still this count would be in terms perfectly sufficient, because it must be taken as a charge against him for mixing upon twenty-one days an entire quantity, or upon each day. Therefore, taking it in any way, it seems to me that it is perfectly sufficient; principally, because this one count gives as much information as if it were multiplied into a hundred and five counts : and because none of the objections arise upon the face of the count, which they must do to furnish a ground for this motion.

GARROW, Baron.—I am of the same opinion as my *Lord Chief Baron* and my brothers. The complaint made in this Court has always been that
the

the counts have been too numerous, and that is an objection which, if it prevailed in point of fact, not only would well be made on the part of the subject, but which the Court, in the shape of an admonition to those who institute these proceedings not to unnecessarily multiply counts, would endeavour of its own accord to repress. In the case of the *King v. Lambirth (a)*, the complaint was, on the other hand, I remember, that the information was so full of counts, that the party without the assistance of a particular, furnished by the Defendant, could not know how to prepare his case.

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Now let us look at this count, and see if it does not give to the Defendant as much information to prepare his defence, as if there had been one hundred and five. It states in substance that the party on the 21st of *October*, 1819, and divers other days and times—what without more? No—divers other days and times circumscribed and limited between that day and the day of filing the information, did mix a certain quantity of table beer and strong beer in certain casks.

Then it is said, that that is uncertain—that it is stated to be *a* large quantity, and that if it is a large quantity it could not be mixed in twenty-one days. It is a very common topic, and I may suppose in other places a very popular one, that there is great oppression in bringing informations for a

(a) Ante, Vol. V. 386.

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great variety of penalties. I do not think so. I think if a Brewer, will offend against the law, with a high hand in a great many instances, it is not unwholesome to proceed against him in a great variety of informations for penalties, leaving it always to the law Officers of the Crown in the exercise of their discretion, and under the benign administration of Justice by the Court, not to pursue a man to his ruin, even where found guilty. So to implead him for a great variety of offences is not always an unjust proceeding. It is said that the authority for this sort of count is to be found only amongst the records of the *Court of Exchequer*. Where else is it to be looked for? If I find that the course of the Court has been to maintain such counts down to the present time, it appears to me to be a current of authority which it would be extremely rash for us to set ourselves against.

Then it is said the objection has never been taken; but that does not shew that the practice has not been sanctioned. I think it operates the other way. When I recollect the names of those who have practised here at the bar, and that the seat of the *Lord Chief Baron* in this Court has been filled by men of the highest learning and ability from amongst those whose talents have adorned *Westminster Hall*, many of them educated in a *Court of Equity*, and many of them possessing a general knowledge of all the branches of the law both criminal and civil, I should have expected it to have been asked—why is this count introduced? why do you encumber your information with this count?

count? I have no doubt that it would have long since been exploded, if the learned Judges who have presided here had not felt that it was a perfectly good count. Therefore the usage and the absence of objection fortifies that which is my own opinion, upon the view of the count; and trying it by the test of the inquiry, whether it furnishes what every man ought to be furnished with, by informations filed against him, the true nature and extent of the charge, it appears to me that this count gives all the information he ought to expect, and all that can be required to enable him to prepare for his defence.

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It has been said, or rather thrown out than argued, that it is very hard to charge the Defendant with a great number of penalties on the same day. Why so? Suppose the Act had said, if a brewer, instead of giving a wholesome beverage to the public, shall mix up *coculus indicus* in a guile tun of beer, he shall pay one hundred pounds,—would it be enough to say I made a quantity of such beer and I filled six hundred casks in one day, take your hundred pounds for that cask I mixed at nine in the morning, but as to the five hundred and ninety-nine I will pay no penalty upon them? The principle of the prohibition is the same, whether it be directed against manufacturing a deleterious beverage, or mixing a lower liquid with a liquid of a higher quality, the higher quality paying a higher duty. Upon all the objections urged on the part of the Defendant in this case, I am of opinion that there is no ground for disturbing
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ing the uniform practice of introducing this count or for arresting the judgment.

Per Curiam,

Rule discharged.

The KING v. DIXON.

Saturday,
22d June.

Breaches of the common exportation bond were assigned in the replication to a plea of performance on *scire facias*, in that the Defendant had not exported, &c. and that he had unshipped and re-landed, &c.

THIS was a proceeding by *scire facias* on the part of the *Attorney-General* against the Defendant for breaches of the condition of an exportation bond, in not exporting spirits, and re-landing them in a British port.

The condition of the bond was in these words:

“Whereas the above bounden *Thomas Dixon* intends to take out of a certain warehouse or warehouses, situated within the premises belonging to the *London Dock Company*, and according to the form of the statute in that case made and provided, to export in the ship or vessel called *Eliza*, whereof *H. Allan* is master, to *Smyrna*, in parts beyond the seas, without payment of any duty, the under mentioned quantities of foreign Brandy and Geneva, that is to say 2 casks containing 134 gallons of Brandy, and

It was proved that the goods (spirits) had been, in fact, shipped and carried out to the place of the vessel's destination—that they were not landed there, but were in part used at that place and on the homeward voyage by the master and crew of the vessel—and that the remainder was brought home into the London Docks where it was emptied out of a beer cask (into which it had been drawn off out of the export cask) into the water. There was no evidence of fraud.

Quare, whether not a fair exportation of the spirits, and so far a literal performance of the condition of the bond; but held to be an unshipping and relanding in Great Britain, and, therefore, so far, a literal breach of the condition, and sufficient to support a verdict obtained by the Crown: GRAHAM, Baron, dub.

“ 182 gallons of Geneva. Now the condition of
 “ this obligation is such, that if the said Brandy
 “ and Geneva or any part thereof shall be *duly*
 “ *shipped and exported to Smyrna* aforesaid, in
 “ parts beyond the seas, and shall not *be unshipped*
 “ *unladen or put on board any other ship* or vessel
 “ or boat (shipwreck or other unavoidable acci-
 “ dent excepted), *nor re-landed in any port or place*
 “ *in Great Britain*, or in the island of *Jersey*,
 “ *Guernsey, Sark or Man*, the obligation to be
 “ void, otherwise to remain in full force and
 “ virtue.”

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The Defendant averred performance, and that he had duly shipped and exported the said brandy and Geneva to *Smyrna*, in parts beyond the seas, and had not unshipped, &c. (in the language of the condition). To that plea a replication was filed, assigning breaches of the bond. The first breach was that the Geneva had not been duly exported to *Smyrna*; the second, that part of the Geneva was unshipped and unladen, and that other part was relanded.

The cause was tried before the *Lord Chief Baron*, at the sittings after last *Easter Term*, when the jury found a verdict for the Crown.

Jervis moved this term for a new trial, on the ground that the verdict was against the evidence; for that it had not been proved that there was no exportation or that there was a relanding in a British port according to the terms of the condi-
 tion

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tion of the bond. The Court granted a rule, and now,

The *Lord Chief Baron* read his report of the evidence. It was proved that the Defendant took on board, besides a piece of brandy, a piece or cask of gin of 120 gallons. The vessel was bound to *Smyrna* and *Constantinople* at one of which places the spirits were to be sold. The brandy was sold at *Smyrna*. The gin was carried to *Constantinople* and back to *Smyrna*, and was not sold. The captain had used for the crew and labourers at *Smyrna* and *Constantinople*, and on the voyage, 60 gallons of the gin, and brought the remainder back. On the vessel arriving in the *Downs* the gin was drawn off into a beer cask, and so brought into the *London Docks*, where the bung was knocked out of the cask, and the liquor thrown into the water. The gin was shifted into the beer cask from the cask which it had been shipped in, whilst the vessel was under quarantine at *Standgate Creek*. The cask in which it had been shipped had the shipping mark, and that was broken up and thrown overboard when the gin was drawn into the beer cask at *Standgate Creek*. The gin was thrown into the water out of the beer cask in the *London Dock* to prevent its being relanded.

The *Attorney-General*, *Clarke* and *Walton* now shewed cause, contending that on the facts in evidence there had been breaches of the bond, both in not having exported the gin in the first place, and next in having relanded it contrary to the terms

terms of the condition; for that the undertaking to export did not mean to carry out merely, but to land the commodity as merchandize—that the bringing it away again would alone be sufficient to shew that the gin had never been exported in the true meaning of that term as used in the condition of the bond—and that if this were held to be an exportation there would be a very great facility afforded for practising frauds in this branch of the revenue.

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They also insisted that the bringing home part of the gin, the rest having been confessedly used on board the ship, and perhaps even before the vessel arrived at *Smyrna*, and pouring the remainder out of the *marked* export cask into beer casks, and finally into the *Dock*, was a re-landing within the terms of the bond, and under such suspicious circumstances as to deprive the Defendant, who must be taken to be bound by the acts of his servants, of all claim to favour.

On either or both these points, therefore, they submitted that the *scire facias* was supported by the facts which proved the breaches of the condition of the bond as charged.

Jervis and *F. Pollock* in support of the rule submitted that there was a *bonâ fide* exportation: and that in the absence of all proof of fraud, which was out of the question in this case, there was nothing like a relanding within the terms of the bond, and the object of the particular revenue regulation.

On

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On the first point they urged that it was quite sufficient that the goods had been carried out as merchandize, as they were proved to have been in this case: and that it was by no means necessary that they should be disposed of abroad; for if no market could be found for them it was not to be expected that they should at all events be left there.

On the other point they urged that there had not been a relanding of the gin. It had been thrown into the water to prevent a relanding, and in order, perhaps, to prevent the further penal consequences of its being found on board—the forfeiture of the ship. As to what had been used abroad they submitted that the Defendant having carried it out to *Smyrna*, had a right to re-purchase it there, or some other, and it would be absurd to say that he might not use it after he had really exported it if he could find no market for it there, where he would have been clearly entitled to have given it away. By throwing it over-board in the docks he had effectually complied with the condition of the bond not to reland, unload, or put it on board any other ship.

They therefore submitted that there ought to be a new trial.

The *Attorney-General*, in reply, urged that the Defendant should in such a case, if he had really meant to deal fairly with the *Excise*, have taken a different course, for that on making a proper representation

presentation to the right quarter, he might have been relieved from any difficulty in which the master had placed him by the bringing back the gin. On the contrary, however, he had acted on his own responsibility, and had dealt with these spirits in a manner which involved him in a breach of the bond. He, therefore, insisted that the verdict ought not to be disturbed.

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RICHARDS, *Lord Chief Baron*.—With respect to myself, I have considered this case as well as I can, and see no reason for disturbing this verdict. These objections were made at the trial as strongly as they are to day. I was then clearly of opinion the verdict was right. I still continue of the same opinion, after hearing the arguments which have been addressed to the Court. This appears to me not to be a fair exportation within the Act of Parliament, and the evidence shewed circumstances of a nature which renders it impossible to quarrel with the verdict, in my opinion.

GRAHAM, *Baron*.—I really cannot help expressing some doubt upon this matter. I am very much affected by the argument which goes to shew, that, if a man setting out from this country goes to the port of exportation, and never lands nor attempts to land his commodity, that does not come within the meaning of exportation. I think the Defendant ought to have given more decisive evidence. If it had *appeared* that there was a probability that this person did go out with a *bonâ fide* intention to sell the gin as well as the brandy
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at *Smyrna*, but that he found no market there, and that, finding no market there, he went to *Constantinople*, and then returned again with it for the same purpose but failed, I should say that was an exportation. Here I feel that ground very much taken from under me, for it was clearly the duty of the Defendant to have called the master. Another consideration which affects my mind with some degree of doubt is, that I cannot myself be made to feel the importance of a fraud of this kind, supposing it to have been intended and practised in coming back with 60 gallons of gin, which could not be worth more than fifteen or twenty pounds, I apprehend. However, I do not so much rely upon that, if there had been shewn to be *ab origine* an intention of coming back with this cask. With respect to the circumstance of their having given part of the gin at *Smyrna* to the laborers, I should have thought that that, perhaps, in some measure might have been accounted for. It would have been ridiculous to impose upon the master the necessity of going to a gin shop at *Smyrna* to purchase that gin of those who might have purchased it of him. I am not very conversant with the laws of *Excise*, but I should have thought there might have been a particular penalty for using for his crew that which he took out. Here the Defendant got into a difficulty, and he shuffled out of it; but in a way not amounting to fraud. If the case had been left to my private opinion I should have thought it ought to have undergone something of a further investigation, that the question of fraud might have been left more fully to the jury.

Wood,

WOOD, *Baron*.—I must confess I find some difficulties in this case. It is admitted on the part of the *Attorney-General* that he does not charge the Defendant with any fraud, and, therefore, the single question will be whether there has been a literal breach of the condition of this bond or of some part of it. In the first place, with respect to that part of the condition which requires that it shall be exported to *Smyrna*, I am not clear that that has not been complied with, for if it were shipped and carried out to *Smyrna*, that would be so far certainly a literal performance of the condition. If the condition had gone further and said “and shall be landed there”, that would have made this a clear breach, but that is not the case. It was suggested that in the course of the voyage outwards they took out some of this gin for the ship’s use,—if they had done that, most undoubtedly it would have been a breach of the condition, for then they would not have exported the whole of that which they undertook to export to *Smyrna*, but I do not know that there is any very clear evidence with respect to its being used on the voyage out.

The next question is whether it has been unshipped, and there is my difficulty. I am inclined to think that in that respect there has been a literal breach of the condition of the bond, and there being a literal breach of the condition of the bond in any one instance, that will be sufficient to support the verdict most undoubtedly. It cannot be denied that this gin was brought back to *England*, and was unshipped; but if we are allowed to look at the real meaning

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meaning of this condition, we must see that there has been no real infraction of it; for the real meaning is that it shall not be unshipped or unladen or put into any other ship, *so that it may get into home consumption* and evade the payment of the duties. Now certainly there has been a mistake. If the captain had thrown it into the sea at *Smyrna*, there would have been no breach of the bond, but he comes into *England*, and finding he has got into a scrape he does not take the proper means of setting the matter right, by doing what he ought to have done; for it appears, by what the *Attorney-General* has said, that if he had applied to the proper authorities they would have passed it over. He does, however, unship it. If he turns it into the water that is an unshipping of it. But does he do any mischief to the revenue? Is that which is thrown into the *London Docks* likely ever to come into home consumption? It is quite a farce to suppose he could have intended any such fraud; for what was thrown into the *Docks* could never have been extracted and brought into consumption. There was, therefore, a literal breach of the bond; though it appears to me there was no fraud intended: but upon that literal breach in my opinion this verdict must stand.

GARROW, *Baron*.—It must be always recollected that the subject-matter of the present discussion before the Court, and upon which the judgment of the Court is to be pronounced, is, whether in this case the verdict which has been obtained shall be set aside, and a new trial had. That is the subject of
 our

our enquiry. Now that can be done only upon one of two grounds, either that the judge who tried the cause has given a direction to the jury, and advice to them upon questions of law, which upon further consideration are not found to be quite correct; or that upon all the facts of the case the jury have come to a wrong conclusion: and, if I had been persuaded by the able arguments addressed to the Court, that either of those grounds had been made out, I should have said there must be a new trial. I am of the contrary opinion on both points.

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It will be recollected that the body of Excise and Customs Laws are not confined to the inflicting penalties on persons for actual breaches of the law, but a great many of them are enacted to prevent persons putting themselves into a situation to enable them to infringe the laws: and it is not a question whether this party has brought the 60 gallons to a profitable market, or mixed them with the water in the docks; (in which case I agree with my learned Brother they were not likely to come again to a profitable state for home consumption in the shape of gin and water) but the law is put in motion, and very properly, when these irregularities take place, in order that those in the same situation with Mr. Dixon, but who have not his sense of character, may be restrained from violating the law, as the learned *Attorney-General* properly states. With respect to Mr. *Dixon* my judgment proceeds upon the ground that he is a man of good character, and that he did not meditate in any part of this transaction any fraud upon the revenue. Still I am

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of opinion that he has so conducted himself with respect to the property over which the revenue Laws have a control, as to have invaded those laws made for the guard of the revenue against fraudulent men.

Now let us see how the case stands. For the purpose of raising a revenue to the country certain articles are subjected to a duty. Those if brought into consumption are subject to an immediate payment of the duty ; but there is a system for the ease of trade, providing that he may bond it in the warehouse : and he may at a future time take it out—he may take it out for home consumption upon the payment of the duty, or he may take it out if he means to re-export it, either wholly as an article of merchandize, or he may take out a limited quantity for the use of those navigating his vessel without any payment of duty at all. But that would have been a very unwise Law which should permit a man to do this without the giving a security ; and therefore the Act requires that he shall ship it on board the vessel to a nominated object of destination, to a final port,—that he shall do more, that he is to ship it, and after he has shipped it he shall not unship it, unlade it, or lay it upon land, or put it into any other boat or vessel—in a word, that he shall not put himself into a situation to enable him to bring it into home consumption, which would be a fraud upon the revenue, and an injury to the fair trader, except in the case of shipwreck or other unavoidable necessity. What does this bond engage for ? That to all intents and purposes the objects of
the

the bond shall be fully met, the two cases of shipwreck or other unavoidable accident excepted. If he is shipwrecked, the act of God excuses him : if his stores are expended by accident, if the casks are broken, or some accident happens by which the contents of them are destroyed ; and necessity for the sustentation of his crew makes him broach that which is intended for a foreign market, that excuses him also. If he gets to the market, however, he must get rid of his commodity, that is, he must not bring it back again. It is asked if he chose at *Smyrna* to expend these spirits, would that have been an infraction of the bond ? I say, no. Other cases may be put,—if he is at short allowance I apprehend he may broach this to eke out the allowance of his crew, or if in consequence of fatigue he serves out a double allowance of grog, that would not bring him within the law, but if he puts himself when he comes into the docks of this country into a situation in which, if disposed to be fraudulent, he may put on shore 60 gallons of gin, it appears to me he has been guilty of an infraction of his bond. I am not disposed to go into the circumstances of the case, lest I should be supposed to be putting this upon the ground of actual fraud which I would wish not to do.

But we must look to the circumstances in some measure, in order to see what is the nature of this case. It has been supposed this has not been put upon the proper grounds, and sifted to the bottom : if that were so, whose fault is it ? It is the fault of the Defendant. We know he came here to take

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upon himself the affirmative proof, that he had performed every condition of his bond. The ship comes into *Standgate Creek*, and is put under quarantine, and there, a market having been found at *Smyrna* for the brandy, a large quantity of the gin remains. He would have been entitled, besides this quantity which he carried out for a market to *Smyrna*, to have carried out other quantities of gin for the supply of his crew; but I take it to be quite clear that he was not entitled under the condition of this bond to broach this merchandize gin for the use of his crew, except in a case of unavoidable necessity. Then when I find that the mate, the only witness called who is cognizant of the transactions of the voyage, tells you that gin was drunk in the voyage out, but where it came from he cannot tell;—when I find a quantity of this, shipped at a bonded warehouse, consumed, and that at *Smyrna* it is drunk familiarly not only by the crew, but by the laborers employed in the ship, I should have desired that it should be shewn that there was no other source from which to supply the crew on the voyage; but there is no such evidence.

Then, when we come to the question of unshipping, I agree with my learned Brother that it is somewhat ridiculous to make the *West India Dock* a large bowl, in which it was meant to convert the liquor into gin and water for consumption; the question, however, is whether the law permits the party to put himself into a situation in which fraud may be committed. I am of opinion that he has done so, and that that is sufficient to sustain this verdict:

verdict : and I think if the case went down again, the directions, the *Lord Chief Baron* would be bound to give to the jury, would be the same as he has already given, the facts being stated to be the same, and that the jury would be bound to find the same verdict. I therefore think the rule ought to be discharged.

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Rule discharged.

The ATTORNEY-GENERAL v. HOULGRAVE,
and another.

Saturday,
23d June.

Construction
of statutes.

Tar distillers,
necessarily
making tar-
acid or acetous
acid, in the
progress of
their manufac-
ture, are
therefore to be

ON the trial of this information, for penalties, against the Defendants (who were tar distillers) for not complying with the provisions of the statutes regulating the vinegar trade, founded on the statutes 10 and 11 *W. III. c. 21. s. 14.*, the 24 *Geo. III. ch. 41. s. 1.* and the 58 *Geo. III. ch. 65. s. 6**.

taken to be vinegar makers, within the 6th sect. of the 24 *Geo. III. c. 56.* : and they are thereby subjected, as such, to all the Excise regulations made by the statutes passed in respect of the makers of vinegar, and are not protected by the proviso in that section ; and consequently are liable to an information for penalties for not giving the usual notice to the Excise, required by the 14th sect. of the 10th and 11th of *Wm. c. 21.*

for

* By that sect. it is enacted. "That all liquors brewed or made, by whatsoever means or manner, into vinegar or acetous acid for sale, and all liquors prepared or preparing for, or capable of being used as, or applied to the purposes of vinegar or acetous acid made for sale, or found in the possession of any vinegar maker or makers for sale, in *Great Britain*, or imported into *Great Britain*, whether any such liquor shall be sold or made for sale, unmixed or mixed with any other ingredient or ingredients, or shall be known and called by the name or names of vinegar, alegar, verjuice, radical vinegar, acetous acid, acetic acid, pyroligneous acid, or by any other name or names, is, are and shall be respectively subject and liable

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for making use of a storehouse, &c. for vinegar, without first giving notice to the Excise, a verdict was found for the Crown, which was entered on the 3d count at the election of the *Attorney-General*.

June 11th. *Jervis* obtained a rule that the *Attorney-General*

liable to, and chargeable and charged with the duties hereby imposed; and that all and every person and persons who shall make, prepare, extract, distil, rectify, purify or sell any such liquors as aforesaid, not being a dealer in, retailer or seller of such vinegar or acetous acid only as he, she or they shall from time to time receive by permit or certificate, as hereinafter mentioned, from some other entered vinegar maker or makers, dealer or dealers, shall be deemed and taken to be a vinegar maker or vinegar makers, and shall be subject and liable to all and every the licence and other duties, provisions, rules, regulations, restrictions and penalties to which makers of vinegar are by law subject and liable. *Provided* always, that nothing in this or any other Act shall, or shall be deemed or construed to extend to charge with any duty any acetous acid, commonly called pyroligneous acid, made or extracted from wood or tar, for sale, in its crude, impure and unrectified state, or any white lead, sugar of lead, verdigris, iron liquor, acetate of lime, acetate of soda, acetate of alumine or any vinegar or acetous acid made, rectified, or purified in any manner whatsoever, at any house or place not entered or used for making vinegar, or rectifying or purifying acetous acid for sale by any maker or makers thereof, being also a maker or makers of the aforesaid compounds or any of them, and which vinegar or acetous acid shall be so made, rectified, or purified by him, her or them, for the sole purpose of making and compounding such articles as aforesaid, or some of them, and shall be wholly used or consumed by himself, herself, or themselves, at the same house or place where made, in the compounding or manufacturing thereof, or any vinegar or acetous acid on which the duties respectively by this Act imposed have been already and before such distillation thereof charged and paid."

should


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should shew cause why that verdict should not be set aside, and a verdict entered for the Defendants on the ground that they were not to be taken to be vinegar makers within the 6th sect. of the statute—or that they were within the proviso excepting certain articles from the payment of duties—and that, therefore, they were not subjected to any of the regulations of the Excise Laws as vinegar makers.

The *Lord Chief Baron* now read his report of the evidence. It was proved that the Defendants carried on the business of tar distillers, and it was stated that by the process of distilling from tar the distiller extracts tar, oil, and *tar acid*, leaving a residuum of pitch. It was also proved that the acid was sold in large quantities to manufacturers of iron liquor, used by callico printers, in its *crude* state *not purified nor rectified*—that, if purified completely, it would be pure vinegar, or rather pure acetous acid, as vinegar would be when purified—and that tar acid was always made by distillation, which necessarily produces oil and acetous acid. Pyroligneous acid was described by the witnesses to be nearly the same thing, extracted from green wood (beech, oak and birch). It was stated by the witnesses that the Defendants never purified the acid extracted from the tar.

The *Attorney-General*, *Clarke* and *Walton*, shewed cause, relying wholly on the words of the statute, upon the construction of which they submitted the Defendants were liable to the Excise regulations,

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regulations, as makers of acetous acid ; for that the provisions of the statutes on which the information was founded were personal and made to diminish the facilities of defrauding the revenue and the fair trader, by subjecting the premises, on which such things were made, to the inspection of the Excise officers, as it was obvious that crude acetous acid made on the tar distiller's premises might be purified, if the premises were not entered.

Jervis, on the other hand, in support of the rule, also relied upon the construction of the statutes, and contended that the evidence brought the Defendants within the terms of the exception of the 58th *Geo. III.* under which alone they could be charged as vinegar makers.

He also adverted particularly to the provisions of the other statutes, and urged that there was nothing in them applicable to the case of these Defendants.

The *Attorney-General*, in reply, insisted that the proviso in the 6th sect. of the 58th *Geo. III.* only exempted the tar distiller from the duty, but that the general tenor of the Act shewed that such persons were intended to be subjected to all the Excise regulations instituted by the statutes relating to the makers of vinegar : and he cited the case of the *Attorney-General v. Green (a)*, in which it was held that a blacking maker who made his own

(a) *Ante*, Vol. IV. p. 224.

vinegar, which he used in his business, was liable to the duty and all the provisions of the several statutes affecting makers and preparers of vinegar for sale. He therefore submitted that there was no ground shewn for disturbing this verdict.

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RICHARDS, Chief Baron.—I cannot bring myself to entertain any doubt upon the construction of this Act of Parliament, and I am clearly of opinion that it applies to the case of these Defendants. It was proved beyond question, and is admitted, that in the course of their trade they make acetous acid. It was to bring that material under the inspection of the Excise, as being an article calculated to be reduced into vinegar, that this Act was passed: and, by its operation, all persons, who shall make or prepare it, are subjected to all the Excise regulations to which vinegar makers were subject before the passing of this Act. I am also clearly of opinion that the Defendants are not exempted from the operation of the statute by the proviso in the 6th section which has been relied on by their Counsel, consequently they have rendered themselves liable to the penalties sought to be recovered by this information.

The rest of the Court concurred.

Rule discharged.

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Saturday,
22d June.Construction
of statutes.

The depending stock of a tanner, with respect to which the regulations of the 5th of Geo. III. c. 43. apply, is not merely the stock of hides and skins, &c. which have been taken out of the wooze, and have been already weighed and marked by the inferior officer of Excise, but the whole of the stock which has been taken out of the wooze. Therefore, the tanner is liable to the penalty, for not providing scales and weights, and for not assisting the officers of Excise in not only re-weighing the stock already weighed by the officer, but in so providing scales and weights for re-weighing, and in examining any part of his stock of hides and skins taken out of the wooze, and being on his premises from that time until the time when they might legally be removed.

The ATTORNEY-GENERAL v. BEVINGTON,
and another.

THE *Attorney-General, Clarke and Walton*, now shewed cause against the rule which had been obtained by *Jervis* for setting aside the verdict which had been found for the Crown, and entering it for the Defendants in this case. It was an information for penalties filed against the Defendants who were tanners, for refusing to provide scales and weights for the re-weighing hides, &c. chargeable with the duties of Excise, and for refusing to assist the surveyors and supervisors in *re-weighing such hides, and examining his* DEPENDING STOCK, contrary to the 5th of Geo. III. ch. 43. s. 22.* It was tried

before

* That section enacts, "That no tanner, &c. shall remove or convey, or cause, &c. to be removed from his yard or drying place, or store rooms, any hides, or skins, or pieces, &c. before the expiration of twenty-four hours next after the stamping thereof by the officers of the said duties, unless the same shall sooner have been weighed by the respective supervisors or surveyors, for the said duties, to the end that the said respective supervisors and surveyors may have an opportunity to reweigh the same after the said officers. And if upon the re-weighing any such hides, or skins or pieces, &c. any additional weight shall be found, such hides or skins or pieces shall be liable to, and chargeable with the respective rates and duties by law payable for such hides or skins, according to such last mentioned weight; and if he shall remove any

before the *Lord Chief Baron* at the sittings after *Hilary Term*.

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The objection taken to the verdict was that it had not been proved in evidence that the Defendants had incurred any penalty, it not having been proved that they had refused to comply with the provisions of the statutes in respect of their *depending stock*, inasmuch as (it was contended) upon the fair construction of the 5th of *Geo. III.* with reference to all the statutes by which the trade of tanning had been subjected to Excise regulations, the depending stock of a tanner must be taken to mean such part of his stock as having been taken out of the wooze, *had been weighed* by the inferior officer of Excise, and was therefore required to be kept ready to be re-weighed by the superior officer for twenty-four hours.

any such hides and skins from the yard, &c. (as before) contrary to the meaning of the Act, he shall forfeit for every offence 50l."

The 22d section is in these words. "And to the end the said respective surveyors and supervisors may not be unnecessarily delayed in the execution of their duty, it is enacted, that from and after, &c. all and every such tanners, &c. shall at their respective yards or drying places be obliged to provide and keep at their own costs and charges sufficient and just scales and weights for the re-weighing such hides and skins, &c. and to bring the same to the scales, and assist the said respective surveyors and supervisors in the re-weighing such hides, &c. and in examining from time to time, the depending stock of every such tanner, &c.; and if any such tanner, &c. shall refuse or neglect to provide and keep at their respective yards, &c. sufficient and just scales, &c. [as enacted] or to assist the said respective surveyors, &c. in the re-weighing them, OR in the examining from time to time their respective depending stock, as this Act directs, he should forfeit 50l."

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The *Lord Chief Baron* read his report of the evidence. The fact of refusing to assist in examining the stock was proved, as was also the course of taking stock by the Excise officers: and one of the witnesses, an inferior officer of Excise, stated that all the uncharged skins which were taken out of the wooze were the depending stock of the tanner.

On the part of the Defendants it was proved that they had no stock on the premises *weighed and marked*, and none that the officers were entitled to *re-weigh*.

On the part of the Crown it was now insisted, that the Excise law made upon that subject by the statute in question, applied to all the tanner's stock of hides &c. taken out of the wooze, and not merely to that which had been weighed and marked by the officer. To render this question of law intelligible it was considered necessary to explain to the Court the course of the Excise in ascertaining and charging the duties payable on the manufactures of the tanning trade—which was stated to be this. The tanner is entitled to put what skins he pleases *into* the wooze without being required to give notice, but he cannot (by 9 *Anne* c. 11. s. 17.) take any *out* without previously giving notice to the officers of Excise that he is about to do so, so that the Excise officers have nothing to do with the business of that trade till the skins are about to be taken out of the wooze. An officer upon notice given as is required by the 9 *Anne* ch. 11. s. 10., taken to be given before
the

the removal of hides or skins out of the wooze, &c. to be dried, then attends, and it is his duty to take the amount in weight and number of the skins taken out of the wooze. The number and weight of such skins is then to be entered in his book. After they have been hung up to be dried, a second notice is given as required by the 19th sect. of the 9th of *Anne*, that upon such a day he means to remove so many skins. The officer then with the assistance of the tanner who must provide scales and weights, is to weigh the skins to be charged with duty. Having weighed them, he stamps them and charges the trader with the duty. Within twenty-four hours after that is done, the superior officer of Excise has a right to re-weigh the weighed skins, which are to be kept separate and apart for that purpose, and if he does not re-weigh them within that time, they are then considered out of the stock. But to provide against frauds, further provisions were thought necessary, and the Law has, by the 5th of *Geo. III.*, enabled the Excise officer to examine the depending stock at any time : and he is not only entitled within a certain time to re-weigh the skins charged, but the depending stock. That depending stock was now contended to be the *whole stock* of the tanner, of hides, skins, and pieces *taken out of the wooze* ; because the object of the statute was, that by the examination of that stock, the officer might see whether any skins had been improperly taken from or added to it ; and therefore the Excise officers were frequently employed in the duty of visiting tan-yards for the purpose of examining and weighing the stock with the

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the object of detecting fraud, which the trade resisted as not being within the statutes.

Jervis, in support of the rule, submitted that at the time when the officers went to the manufactory of the Defendants for the purpose of re-weighing the stock, there was no depending stock on the premises, the whole of the weighed and marked stock having been at that time lawfully removed. The whole question he, therefore, admitted would be, what was to be considered a tanner's depending stock within the meaning of the several statutes, 9 *Anne* c. 11. s. 5. 5 *Geo.* I. 5 *Geo.* III. c. 43. s. 21. and 22.

He contended that the words meant that stock only which had been weighed by the usual inferior officer, and which the tanner could not remove till twenty-four hours after, unless re-weighed by the superior officer in the mean time—in other words, the stock in the tanner's possession, which had been weighed between the period of weighing and that allowed for re-weighing; otherwise the Excise would have power to examine the entire stock during the whole progress of the manufacture: and considering the great expense to the tanner of each examination, being himself obliged to provide the scales &c. and to assist in the weighing, it would be a very inconvenient construction to the trade. Therefore it had been resolved to try the present case in order to bring the question before the Court, as it had been long a subject-matter of dispute between the tanners and the Excise officers.

He

He particularly directed the attention of the Court to the recitals of the 5th of *Geo. I.* which shewed expressly what the intent and object of the legislature in the enactment was—the prevention of fraud and collusion after the skins had been weighed and taken an account of, between the inferior officers of Excise and the tanners. Thus by the 5th of *Geo. III. c. 43. s. 21.* after adverting to the former statutes, and reciting as an evil, “that many tanners through various pretences frequently removed skins from their drying places, immediately after the same had been weighed and marked by the officer for the said duties, whereby the respective surveyors and supervisors for the said duties, *have been prevented from re-weighing* and taking an account thereof, so that great frauds have been committed between the said traders and the inferior officers of Excise, it is enacted that they shall not remove such skins for twenty-four hours after the stamping &c.” Then follows immediately the section in question (the 22d):—so that the recital of the evil clearly shews to what particular fraud the statute was meant to apply, and to what particular part of the tanner’s stock as being the subject of it, namely, the stock which had been weighed and marked &c. That part of the stock it was which the legislature had distinguished by the description of *depending* stock. The section, at its commencement, restrains the generality of the application of it, by stating the object of the enactment to be “to the end that the surveyors and supervisors may not be unnecessarily delayed in the execution

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execution of their duty,—that is the duty of reweighing the depending stock. He, therefore, contended that the information was not supported by the evidence.

The *Attorney-General*, in reply, relied also on the provisions of all the statutes, as being in *pari materiâ*, insisting that the depending stock meant the whole of the hides and skins lying or depending on the tanner's premises, between the time of their being taken out of the wooze, the time of their being legally removeable : and he commented very minutely on the different sections of the several statutes, and adverted to the constant practice of the Excise, as shewing that such was necessarily the meaning of the term, as applied to the subject-matter, with reference to the object of the several enactments.

The *Lord Chief Baron* adverting to the evidence declared, that he had no doubt that the construction put on the Act of Parliament by the *Attorney-General*, and adopted in practice by the Excise, was right, and that, therefore, there was no ground for disturbing the verdict.

GRAHAM, *Baron*, was of the same opinion. His Lordship said that he considered the words “from time to time,” used in the section in question as making the construction contended for by the Crown quite clear—giving the officers the right of examining at any time, as the tanner's depending stock, all
the

stock taken out of the wooze and not marked as required by the statute.

WOOD and GARROW, *Barons*, concurred.

Rule discharged.

THE ATTORNEY-GENERAL v. TYSON.

Wednesday,
26th June.

A RULE having been obtained requiring the *Attorney-General* to shew cause why the trial of this information, of which notice had been given for the next sittings after term, should not be postponed,

The *Attorney-General*, *Clarke* and *Walton*, now shewed cause against it, contending that the affidavit was insufficient, and did not afford any reasonable ground for postponing the trial.

The affidavit was in the following words : “ *William Tyson*, of *Harwood Dale*, in the *North Riding* of the *County of York*, Farmer, the Defendant in this cause, maketh oath and saith, that issue was joined in this cause in this present *Trinity Term*, and that notice was given for the trial thereof, at the sittings after the said Term ; and this Deponent further saith, that *Thomas Crossby*, late of *Harwood Dale* aforesaid, Husbandman, is a material witness for him this Deponent in the said cause, as he is advised and

VOL. XI. R “ believes,

The affidavit made by a Defendant in an information by the Attorney-General for penalties to ground a motion for postponing the trial on the absence of a witness, must be most minutely and circumstantially particular as to all the matters stated, or it will be considered insufficient to support a rule to shew cause granted for that purpose.

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“believes, and that he cannot safely proceed to
 “the trial thereof without the testimony of him
 “the said *Thomas Crossby*, and this Deponent fur-
 “ther saith that, in consequence of the notice of
 “trial so given as aforesaid, he this Deponent
 “caused enquiry to be made after the said *Thomas*
 “*Crossby* (who lived with this Deponent as a
 “yearly servant), and that he this Deponent has
 “also taken great pains to find out his present
 “place of residence, but has not succeeded. And
 “this Deponent further saith, that he has no
 “doubt but that the said *Thomas Crossby* will at-
 “tend the meeting for the hire of servants in this
 “neighbourhood, at *Egton*, which is usually
 “held on the 5th *November* in each year, when
 “this Deponent will most likely meet with him,
 “and procure his attendance at the hearing of this
 “cause in the ensuing *November Term*.”—Sworn,
 &c. They contended that it should have been
 stated of whom the Deponent made enquiry as to
Crossby, and what the answer was to such enquiry.
 Further, the person of whom the Defendant made
 the enquiry should have joined in the affidavit.
 And lastly, the affidavit should have stated that
Crossby lived with the Deponent at the time of the
 transaction meant to be enquired into. *Non con-*
stat but that *Crossby*’s service may have been many
 years before the period to which the information
 relates.

D. F. Jones in support of the rule urged, that
 the affidavit was necessarily made as appears by
 the dates upon the day after notice of trial received,
 in

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in order to prevent another objection, which would certainly have been taken if possible, namely, that the application came too late. That necessary haste would satisfactorily account for the affidavit not stating more fully the different particulars as to the enquiries made. The question is whether the affidavit does not shew reasonable ground for postponing the trial under the circumstances. Enquiry is sworn to have been made in fact. It also appears to have been made as early as possible. The name of the witness is given, and it is but a fair construction to take it that he was Deponent's servant at the time of the transaction, as to which alone his evidence could be material in the present case. But even if the whole allegation as to his living as servant be expunged, it will still remain that *Crossby* is a material and necessary witness, which is all that is requisite to be shewn. With respect to the suggestion that the person of whom enquiry was made should have joined in the affidavit to confirm the fact of enquiry, it was said that such a confirmation was not usually required, and the case of an information by his Majesty's *Attorney-General* was not an exception in point of practice.

Per Curiam.

We think the affidavit wholly insufficient on the grounds stated, and that, therefore, the rule must be discharged.

Rule discharged.

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26th June.

The trial of an Excise information, ordered to be postponed where the Court were not unanimous in considering the affidavit made to found the application not sufficiently circumstantial.

The ATTORNEY-GENERAL v. DODSWORTH.

D. F. JONES having obtained a rule *Nisi* for postponing this trial of an information for penalties for breach of the Excise Laws,

The *Attorney-General*, *Clarke* and *Walton*, now shewed cause against the rule, contending that this affidavit was wholly insufficient. The affidavit was made by *John Dodsworth*, the Defendant in the cause. It stated that issue was joined in this present *Trinity Term*, and that notice was given for the trial thereof, at the sittings after the said Term; that *Richard Brigham*, late of *Beverley*, in the *East Riding* of the said county, hostler, was a material witness for the Deponent in the said cause as he had been advised and believed, and that he cannot safely proceed to the trial thereof without the testimony of the said *Richard Brigham*; that in consequence of the notice of trial so given as aforesaid, the Deponent caused enquiry to be made after the said *Richard Brigham*, but that he had not been able to find him out, and that he this Deponent went over to *Beverley* on *Tuesday* the 18th day of *June* instant, for the purpose of subpoenaing the said *Richard Brigham*, when he found he had left the service at the *Beverley Arms*; for some other service which the Deponent has not been able to find out; and that although he had set a diligent enquiry on foot after him, he feared he should not be able to meet with him in
time

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time for the hearing of this cause at the ensuing sittings after *Trinity Term*, but that he had no doubt of his doing so against the following *Michaelmas Term*. It was urged against the rule that the affidavit was not sufficient; for that it was not stated that the Deponent had enquired after the witness at the *Beverley Arms*, nor of whom, nor by whom any enquiry was made, nor was there any confirmation of the fact of such inquiry by the person to whom it was addressed, nor any circumstances stated to shew that a *bonâ fide* and diligent search had been made to find the witness.

D. F. Jones, in support of the rule, insisted that the statement was sufficient;—the fact of enquiry was sworn to;—the date of the enquiry was as early as possible;—the name of the witness was given;—and it was sworn that the Defendant cannot proceed to trial without his testimony;—that it was material;—and that from the statement that “it was found” he had left his service at the *Beverley Arms*, the fair inference is that enquiry must have been made at that place where he was most likely to be met with, and which was the natural place for enquiring for him, whether he had left it or not. If the Deponent did not go to *Beverley* and make enquiries there, he might be indicted for perjury upon this affidavit. It was also submitted as worthy of consideration, that it would be the more liberal course on the part of the Crown to make the rule absolute under these circumstances, upon this affidavit to postpone the case to the next sittings, rather than hurry

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hurry on the trial against the Defendant in the absence of his witness.

Mr. Baron WOOD having expressed an opinion in favor of the rule being made absolute, in which *Mr. Baron GRAHAM* concurred,

The *Lord Chief Baron* stated, that it was with reluctance that he found himself obliged to accede to that opinion on the doubt expressed by two members of the Court ; but his Lordship added that in his mind the affidavit was certainly insufficient in respect of the omission of the allegation which, it had been urged on the part of the Crown, ought to have been introduced, and that upon such a loose affidavit he should himself have considered that the trial ought not to have been postponed, if an application had been made to him for that purpose at *Nisi Prius*.

Mr. Baron GARROW concurred with the *Lord Chief Baron*, but yielded also in consideration of the doubt entertained by the rest of the Court.

They therefore made the

Rule absolute.

JONES v. STEVENS.

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THE Plaintiff in this action on the case [for damages for a libel] which was tried before the Lord Chief Baron at the last sittings for *Middlesex*, obtained a verdict, damages 50*l.*—the learned Judge reserving leave to the Defendant to move that a nonsuit might be entered on the points of law reserved.

Evidence (in actions for libel and slander).

In an action for a libel on the Plaintiff, tending to injure his credit and reputation in his profession and business of an attorney, and defamatory of him in his said profession and business.

In the early part of the term, on the motion of

the Plaintiff, it was held to be sufficient evidence of the Plaintiff being an attorney, that it was proved by the book of admissions produced by the proper officer, and that he practised as an attorney.

It was also decided to be no objection to maintaining such an action, that it appeared in evidence that during the time of the grievances stated in the declaration, the Plaintiff had omitted to take out his certificate as required by the 37 Geo. III. c. 90. for more than a year; but that he might still sue as an attorney for damages in consequence of a libel imputing improper conduct to him in his character of attorney.

One writ produced, with three declarations, and three rules to plead in the same suit, is sufficient evidence of three actions having been commenced by such process.

Statements made in a libel have the effect of dispensing with proof, on the part of a Plaintiff, of facts so stated, if they become necessary to support the Plaintiff's case.

General evidence of the Plaintiff's bad character and ill repute in his business as a practising attorney can not be admitted either to contradict the allegation in the declaration, that the Plaintiff during, &c. exercised and carried on the business of an attorney, with great credit and reputation, with a view to mitigating damages on the general issue, or in support of averments in the Defendant's pleas pleaded by way of justification that the Plaintiff was a disreputable professor and practitioner in the law. The case of the *Earl of Leicester v. Walter* (2 Campb. N. P. C.), denied by this Court to be law.

Pleading in Actions for Libel and Slander.

In declarations in actions for libel no unnecessary averment should be introduced, and regard should be had, in drawing such declarations, to the libel itself, which is now admissible as proof of all that is positively averred therein.

Pleas by way of justification, generally aspersing the character of the Plaintiff by averments, without stating particular acts of bad conduct apposite to the justification of the Defendants, are not only demurrable, but ought to be demurred to, as due to the Court and to the Judge before whom the action may be tried.

It is an erroneous notion that by demurring to a plea of justification the Plaintiff necessarily admits the truth of the slanders in a libel. That which is well pleaded only is admitted.

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Brougham on the part of the Defendant, the Court granted a rule to shew cause why the verdict should not be set aside, and a nonsuit entered, or why there should not be a new trial had, on the several objections which had been taken at *Nisi Prius*, arising upon the pleadings and the evidence given on the trial.

The declaration stated after the usual inducement that the Plaintiff was a good, true, honest, just, and faithful subject of this realm, and as such had always hitherto behaved and conducted himself, and, until the committing the several grievances by the Defendant as therein after mentioned, was always reputed, &c. to be a person of good name, fame and credit, to wit at, &c. that at the time of committing the said grievances was, and for divers, to wit, *ten years before that time elapsed had been, and still was an attorney of the Court of our Lord the King of the Bench at Westminster aforesaid, and the profession and business of an Attorney during ALL the time aforesaid, used, exercised and carried on as well at Hanley in the county of Stafford, as at Stafford in the said county, with great credit and reputation, to wit, at Westminster, &c. aforesaid, and that before the committing of the said grievances, the said Plaintiff had commenced certain actions in His Majesty's Court of Exchequer, at Westminster, upon a certain bond or written obligation called a bail bond, against one Samuel Leake and certain other persons who had entered into the said bond, as bail or sureties for the said Samuel Leake, the costs in which said actions had*
by

by the proper officer of his Majesty's said Court been *taxed at a certain sum of money*, to wit the sum of twenty-one pounds seventeen shillings and sixpence, the taxation of which said costs had been attended by a certain person by the said Plaintiff, before that time retained and employed as the agent of the said Plaintiff, in that behalf, to wit, at *Westminster* aforesaid, in the county last aforesaid, yet the said Defendant well knowing the premises, but contriving and wickedly and maliciously intending to *injure* the said Plaintiff in his *credit and reputation*, in his said *profession and business of an attorney* as aforesaid, and to cause it to be *suspected and believed* that he the said *Plaintiff had conducted himself dishonestly and improperly in his said profession and business of an attorney*, and to vex, harass, impoverish, and wholly ruin him the said Plaintiff, heretofore, to wit, *on the 11th day of February*, in the year of our Lord one thousand eight hundred and twenty, to wit, at *Westminster* aforesaid, in the county of *Middlesex* aforesaid, wrongfully, maliciously and injuriously did compose, print, and publish, and cause and procure to be printed and published, a certain false, scandalous, malicious and defamatory *libel of and concerning the said Plaintiff in the way of his said profession and business of an attorney, and of and concerning the said actions*, so by him commenced against the said *Samuel Leake* and his bail on the said bond or written obligation as aforesaid, and of and concerning his the said Plaintiff's conduct in those actions, and of and concerning the costs thereof, in which said libel was and is contained, amongst other things the false,

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false, scandalous, malicious, defamatory and libellous matter following, of and concerning the said Plaintiff, *in the way of his business and profession as an attorney*, that is to say, “ It is but justice to say that the agent (thereby meaning the person employed by the said Plaintiff as his agent *in the said actions so commenced by him*, against the said *Samuel Leake* and his bail as aforesaid), whom I am told by a friend is a respectable man, admitted that he (meaning the said agent of the said Plaintiff as aforesaid) individually scorned to take the money, but his client insisted on it. Now know, learned reader, that this immaculate client (meaning the said Plaintiff) is *Thomas Jones of Hanley in the Potteries*, with reference to whose character and conduct I refer you to his neighbours ; he is a man who, if you allow to speak for himself, is more sinned against by other men than he sins against them. He carries on business (meaning the said business and profession of an attorney) at *Hanley*, and he had an assistant, in a cheap shop at *Stafford*, to carry on his business there, one of the tribe of journeymen tanners of the name of *Hammond*. They rioted for a long time in their practices with profits satisfactory to both, and the most benignant sensations towards each other ; at length they quarrel, and their newspaper press groaned under their reiterated accusations, till *Jones* got the start of *Hammond*, and indicted him for not keeping the books with the accuracy that the King’s accountants do, and *Hammond* was transported at the last *Stafford Sessions*. While concord prevailed, they were *par nobile fratrum* (thereby

(thereby meaning and insinuating that *the said Plaintiff* was of as bad and infamous a character as *the said Thomas Hammond*), but poor *Hammond* cannot now, if he wished to do it, send for Exchequer subpoenas to warrant cognovits dated forward and kept back till the writ arrived which legalised them, and enabled him by the next post to send for an execution. On *Hammond's* trial several gentlemen and commoners, moved by malice and the instigation of the devil (no doubt *Jones* would say), ventured to swear that they would not believe *Jones* on his oath, and if the reader refers to the *Staffordshire Advertiser* of the 15th of January, he will find some ludicrous reasons assigned as the grounds of their disbelief.

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“ *Mr. Jones* attacked these witnesses in the next *Staffordshire Advertiser*. His philippic clearly proves he does not always write English, however he may have been injured, and it seems now the jackall (meaning the said *Thomas Hammond*) is gone, the lion is short of provender; for we find at the end of his letter an advertisement for business, in these words: ‘ P.S. Informations of acts or expressions of certain individuals indicative of hostilities towards me will be thankfully received from respectable persons at my offices, at *Hanley* and *Stafford*.’ ”

There were four other counts in the declaration, in each of which the libel was charged to be “ of and concerning the Plaintiff in the way of his aforesaid profession and business of an attorney.”

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The declaration concluded thus: " by means of the committing of which said several grievances by the said Defendant as aforesaid, the Plaintiff had been and was greatly injured in his said good name, fame and credit, and brought into public scandal, infamy and disgrace, with and amongst all his neighbours and other good and worthy subjects of this realm, insomuch that divers of those neighbours and subjects, to whom the innocence and integrity of the said Plaintiff in the premises were unknown, have, on occasion of the committing of the said several grievances by the said Defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe the said Plaintiff to have been and to be a person guilty of improper and *unprofessional conduct* in the exercise of his aforesaid *business and profession of an attorney as aforesaid*, and have, by reason of the committing of the said several grievances by the Defendant, from thence hitherto wholly refused and still do refuse to have any transaction, acquaintance or discourse with him the Plaintiff, *as they were before used* and accustomed to have, and otherwise would have had, and he the Plaintiff hath been and is by means of the premises aforesaid greatly injured, prejudiced, aggrieved and damnified, to wit, at," &c.

The Defendant pleaded the general issue, and also by way of justification the following special pleas: First, that theretofore and before the committing of the said several supposed grievances, in the 1st count of the declaration mentioned, or any
part

part thereof, to wit, on the 1st of *January* 1819, at, &c. one *Thomas Dax*, being then and there a respectable man, and the person employed by the said Plaintiff as his agent in the said actions so commenced by him against the said *Samuel Leake* and his bail, as in the said declaration mentioned, said, published and admitted, that he the said *Thomas Dax* individually scorned to take the said sum of money, at which the said costs in the said actions had been so taxed, as in the said declaration mentioned, but his client insisted on it—averring that the Plaintiff theretofore and before the committing of the said several supposed grievances, to wit, &c. (1st Jan. 1816) and from thence, &c. until, &c. (1st Jan. 1819) had an assistant, that is to say, the said *Thomas Hammond*, in the said declaration mentioned, who then and there was an assistant of the said Plaintiff so being such attorney as in the said declaration mentioned, in a cheap shop at *Stafford* aforesaid, that is to say at *Westminster* aforesaid, in the county aforesaid, to carry on therein, and that the said *Thomas Hammond*, as such assistant, then and there carried on therein his the said Plaintiff's business of an attorney; and that, during all the time last aforesaid, the said Plaintiff and the said *Thomas Hammond* there lived and conversed together in habits of good intimacy, familiarity and friendship, until heretofore and before the time of the committing of the said several supposed grievances or any part thereof, to wit, &c. (on the 1st February 1819) the Plaintiff and the said *Thomas Hammond* quarrelled, to wit, at *Westminster*, &c. and then and there published
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divers, to wit, fifty *accusations each against the other in divers*, to wit, ten *newspapers*, and thereupon afterwards and before the time of the committing of the said several grievances or any part thereof, to wit, at the session of the peace held in and for the said county of *Stafford* next before the said last mentioned time, to wit, on the 13th of *January* 1820, the said Plaintiff caused and procured the said *Thomas Hammond* to be indicted for a certain offence, cognizable by the laws of this realm, for which he was liable to be transported. And such proceedings were thereupon had that afterwards, to wit, on the same day and year last aforesaid, at a session of the peace duly held in and for the said county of *Stafford*, to wit, at *Westminster* aforesaid, the said *Thomas Hammond*, was by due course of law tried upon the said indictment for the said offence and duly convicted thereof, and sentenced to be transported for the same. And further averring that upon such trial of the said *Thomas Hammond*, for the offence aforesaid, to wit, on, &c. at, &c. several gentlemen and commoners, that is to say one *John Caithness*, one *John Clare*, one *Ralph Stevenson*, one *Thomas Taylor*, and one *Thomas Mayer* ventured to swear, and then and there did swear, that they would not believe the said Plaintiff on his oath, and in a certain newspaper called the *Staffordshire Advertiser*, of the 15th of *January* in the year of our Lord 1820, certain ludicrous reasons were and are mentioned and assigned as the grounds of the said disbelief of the said *John Caithness* and of the said *John Clare*, to wit, at *Westminster* aforesaid, in the county aforesaid.

And

And further, that in the said newspaper called the *Staffordshire Advertiser* as aforesaid and published next after the said *Staffordshire Advertiser* of the 15th of January aforesaid, to wit, on the 22d day of January, in the year of our Lord 1820, the said Plaintiff did print and publish a certain letter of him the said Plaintiff, containing an attack on the said persons who had so sworn as herein before mentioned, written in part thereof ungrammatically and in bad English, and that at the end of the said letter there then and there was an advertisement for business in these words (&c. &c. as in libel set out above from "P.S.," ante p. 239., to the end).

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The second special plea was, that heretofore and before the committing of the said several supposed grievances in the said declaration mentioned, or any part thereof, to wit, on the 1st of January 1810, to wit, at *Westminster* aforesaid, one *Thomas Dax* admitted that he the said *Thomas Dax* individually would not have taken the said sum of money of which the said costs in the said actions had been so taxed as in the said declaration mentioned, but his client insisted on it: and the plea averred that the Plaintiff had an assistant, that is to say the said *Thomas Hammond*, who then and there was an assistant of the said Plaintiff so being such attorney as in the said declaration mentioned, in a certain cheap office there, to wit, at *Stafford* aforesaid, to carry on therein, and that the said *Thomas Hammond*, as such assistant as aforesaid, then carried on therein his the said Plaintiff's business of an attorney, at *Stafford* aforesaid,
 to

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to wit, at *Westminster* aforesaid, and that the said Plaintiff caused and procured the said *Thomas Hammond* to be indicted for a certain offence cognizable by the laws of this realm and for which he was liable to be transported, and such proceedings were thereupon had, that afterwards, to wit, on the same day and year last aforesaid, at a session of the peace duly held in and for the county of *Stafford*, the said *Thomas Hammond*, was by due course of law tried upon the said indictment for the said offence, and duly convicted thereof, and sentenced to be transported for the same, to wit, at *Westminster* aforesaid, in the county aforesaid: and it further averred, that before the said Plaintiff and the said *Thomas Hammond* quarrelled as aforesaid, and before the said *Thomas Hammond* was indicted as aforesaid, *the character of the said Plaintiff was in no respect better or more respected than the character of the said Thomas Hammond, and that the said Plaintiff was held and reputed by and amongst his neighbours, and other good and worthy subjects of this realm to whom he was known to be a DISRESPECTABLE PROFESSOR AND PRACTITIONER IN THE LAW, that is to say a person who conducted and carried on HIS PROFESSION OF AN ATTORNEY upon the principle of no cure no pay, that is to say, that in case the said Plaintiffs did not succeed in the business, matters and things which he was employed by his clients to transact and perform, that he the said Plaintiff would make no charge on his clients for the same: and further, that on the said last mentioned trial of the said Thomas Hammond for the offence last aforesaid committed by him,*

him, several gentlemen and commoners, to wit, the said *John Caithness*, the said *John Clare*, and the said *Ralph Stevenson*, ventured to swear, and did then and there swear that they would not believe the said Plaintiff on his oath, and in a certain newspaper, to wit, the *Staffordshire Advertiser*, of the 15th of *January* in the year of our Lord 1820, certain ludicrous reasons were and are mentioned and assigned as the grounds of the said disbelief of the said *John Caithness*, and of the said *John Clare*. And the said Defendant further saith, that in the said newspaper called the *Staffordshire Advertiser* of the 15th of *January* aforesaid, to wit, on the 22d day of *January* in the year of our Lord 1820, the said Plaintiff did print and publish a certain letter of the said Plaintiff containing an attack on the said persons who had so sworn as hereinbefore mentioned, which was not throughout English, and that at the end of the said letter there then and there was a certain advertisement by way of postscript for business, to wit, as follows, [as in libel from "informations of acts" to "my offices at *Hanley* and *Stafford*."] Wherefore he the said Defendant afterwards, to wit, at the said several times, when &c. in the said declaration mentioned, to wit, at *Westminster* aforesaid, in the county aforesaid, did print and publish, and cause, and procure to be printed and published the said several supposed libels in the said declaration mentioned, in manner and form as therein mentioned, as he the said Defendant lawfully might for the cause aforesaid, and this he the said Defendant is

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ready to verify, wherefore he prays judgment if, &c.

The Defendant pleaded, thirdly, as to the printing and publishing and causing, &c. all the said several supposed libels in the declaration mentioned, except as to such part thereof as contained the words following, "their newspaper press groaned under reiterated accusations," and also such as contained the words following, "While concord prevailed they were *par nobile fratrum*" *actio non*, &c. because, &c. [proceeding as in the first plea pleaded by way of justification till the words "insisted on it."] The plea then averred that the Plaintiff had an assistant, to wit, the said *Thomas Hammond* in the said declaration mentioned, who then and there was an assistant of the said Plaintiff *so being such attorney* as in the said declaration mentioned, in a cheap shop at *Stafford* aforesaid, that is to say at *Westminster* aforesaid, in the county aforesaid, to carry on therein, and that the said *Thomas Hammond* as such assistant did then and there, to wit, at *Stafford* aforesaid, carry on therein his the said Plaintiff's said business of an attorney, *on certain cheap, irregular, unprofessional and disreputable terms and conditions*, to wit, the terms and conditions following, that is to say *that if the client or clients of the said Plaintiff should not succeed in the suit or suits instituted on their or his behalf by the said Plaintiff, he the said Plaintiff should not, nor would demand or require any costs or remuneration in or for conducting the*
said

said suit or suits from his said client or clients therein, to wit, at &c. This plea concluded with nearly the same averments as the first special plea, commencing with the allegation that the Plaintiff caused *Hammond* to be indicted, &c. &c. wherefore, &c. (justifying as before).

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The fourth special plea averred, generally, that *the several supposed matters and things in the said several supposed libels in the said declaration mentioned, contained at the respective times of the printing and publishing thereof, were and are, and each and every of them, then was and is true*, to wit, at *Westminster* aforesaid, in the county aforesaid, wherefore he the said Defendant at the several times when, &c. in the said declaration mentioned did print, and publish, and cause, and procure to be printed and published, the said several supposed libels in the said declaration mentioned, in manner and form as therein mentioned, as he lawfully might for the cause aforesaid, to wit, at *Westminster* aforesaid, in the county aforesaid. And this he the said Defendant is ready to verify : wherefore he prays judgment if the said Plaintiff ought to have or maintain his aforesaid action thereof against him.

The Plaintiff replied to the special pleas *de sua injuriâ absque causâ*, upon which issues were taken.

The two objections made and reserved on the trial, on which that part of the application which sought to enter a nonsuit was founded, were,

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First, that it had not been sufficiently proved on the trial in support of the averments in *each count* of the declaration, that the Plaintiff was at the time of publishing the alleged libel, and during the period mentioned in the declaration, an attorney of the *Court of King's Bench*, and legally entitled to practise; but that it was proved on the contrary that he had during all that time no legal right or authority to practise as an attorney, with reference to the statute of the 37th of *Geo. III. c. 90**.

* By the 26th sect. of that statute it is enacted, "That every person who shall be admitted an attorney, shall annually, between the first day of *November* and the end of *Michaelmas Term*, deliver in to the Commissioners of the Stamp Duties, a note of his name and usual place of residence, and that thereupon he shall be entitled, on payment of the duties, to a certificate to be issued by the proper officer."

By the 27th sect. such certificates are required to be entered, and by the 28th sect. they are made to determine on the 1st day of *November* following.

By the 30th sect. any person who shall practise in any of the Courts in the Act mentioned, without obtaining a certificate and entering it in one of the Courts wherein the person shall have been admitted, is rendered subject to a penalty and made incapable of maintaining any action for fees for business done.

By the 31st sect. it is enacted, "That every person who having been admitted *an attorney* shall neglect to obtain his certificate for one year, shall from thenceforth be incapable of practising by virtue of such admission," and "that the *admission*, entry, enrolment or register of such person in any of the said Courts shall be from thenceforth *null and void*," with a proviso that nothing in the Act of Parliament shall be construed to prevent any of the Courts from re-admitting such person on payment of the duties which should have accrued in the interval.

It

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It was urged upon the objection founded on this statute, that the Plaintiff not being an attorney *legally entitled to practise* during the time stated in the declaration, the action which was for a libel on him in his character and business of an attorney, as charged in every count of the declaration, could not be sustained.

It was also contended that the averment in the first count of the declaration; that the Plaintiff had commenced the actions there alleged to have been commenced by him on the bail bond, had not been well proved: nor had the execution of the bail bond; or the taxation of the costs been proved, which formed part of the averments in the same count—and that, consequently, the action could not be maintained, as the declaration had not been supported by sufficient evidence, so many material averments not having been proved.

A third objection was now taken to the verdict, and urged as a ground of motion for a new trial, arising on the rejection by the *Lord Chief Baron* at the trial of evidence offered on the part of the Defendant—in support and proof of his second and last pleas, by way of justification, and in contradiction of the averment in the declaration, that the Plaintiff had used, exercised and carried on the profession and business of an attorney with great credit and reputation—that the Plaintiff was of general bad character and repute in his practice and business of an attorney, as stated generally in the terms of the pamphlet, and alleged in the particular

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lar special pleas by way of justification. It was now contended that such evidence ought to have been received, and in support of that ground of the present application the Defendant's Counsel cited the cases of the *Earl of Leicester v. Walter* (a), — v. *Moor* (b), *Williams v. Callendar* (c), in all of which cases such general evidence had been admitted upon the general issue in mitigation of the charge, and to diminish the damages.

There was a fourth objection made on the point of rejected evidence, as the *Lord Chief Baron* had refused to admit a *Staffordshire* newspaper tendered in proof of the allegation, in the three first pleas pleaded by way of justification, that the Plaintiff published therein an attack on the several persons, who had sworn, on the trial of *Hammond*, that they would not believe *Jones* on his oath; and that he had procured to be inserted therein, the advertisement stated in some of the pleas to have been published by him.

The *Lord Chief Baron* now read his report of the evidence, from which it appeared that one writ and three declarations against the principal and his bail had been produced, to shew that certain actions had been brought by the Plaintiff against *Leake* and his bail, as stated in the declaration, and three *allocaturs* of the costs taxed in the same actions were also put in and proved. A witness then proved the publication of the libel, a

(a) 2 Campb. N. P. C. 251. (c) Holt. N. P. C. 307. and
 (b) 1 Maule and Selw. 284. Mills v. Spencer, Ib. 534.

copy having been sold to him by the Defendant, on the 23d of *December* 1821. The Plaintiff next called the officer of the Court of Common Pleas, who proved the admission of the Plaintiff as an attorney, and the enrolment of his admission in the year 1810. On his cross examination, he stated that he officially kept the book in which the certificates of attorneys admitted of that Court were entered, and that there was no entry of any certificate obtained by the Plaintiff from *November* 1813, to *November* 1814, nor from *November* 1821 to the 21st of *February* 1822, when the last entry of any certificate obtained by the Plaintiff was made. The Plaintiff's Law agent in town proved that he had during the period mentioned in the declaration, carried on business and practised as an attorney.

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On this evidence, on the part of the Plaintiff, the objections to its sufficiency stated above were made and overruled, but the *Lord Chief Baron* reserved the points.

The report also stated that witnesses were proposed to be called on the behalf of the Defendant to prove that the Plaintiff was a person of evil repute and bad character as a professional practitioner, whose testimony the *Chief Baron* refused to receive, as being wholly inadmissible.

Jervis, Taunton, and Cross, now shewed cause.

Wednesday,
19th *June.*

As to the first objection, they submitted that it
was

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was not necessary for the Plaintiff in support of the present action, to give in evidence, in proof of his being an attorney, his certificates or the years during which he was alleged in the declaration to have been an attorney, insisting that it was quite sufficient, *prima facie*, to shew that he had been admitted an attorney, and that he practised; and that it would then be incumbent on the Defendant to disprove that, or give evidence of the Plaintiff's neglect in not having taken out his certificate, or procured it to be duly entered, if either were requisite to be done, and thus to negative such necessary qualification of the Plaintiff's admittance as an attorney as averred in the declaration.

They also contended that it was now sufficiently established by the authority of decided cases, that where a person was in actual practice as an attorney, it was not necessary to prove even that he was admitted, by a copy of the roll, or that he had duly observed any formality necessary to enable him to practise legally: and they cited *Berryman v. Wise (a)*, and a recent case determined in this Court*, wherein it was decided, on the authority of *Berryman v. Wise*, that the Plaintiff, in an action for a libel, is not called upon to prove that he is legally invested with the particular character in respect of which he has been libelled by a charge of misconduct in exercising the functions of that character. On the same point they cited also the

(a) 4 Term. Rep. 366.

* *Bagnall v. Underwood*, Court of Exchequer, E. T. 3 Geo. IV.

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case of *Smith v. Taylor* (a), and *Lewis v. Clement* (b), where the present *Chief Justice* of the *King's Bench* so ruled at *Nisi Prius* on that preliminary objection being taken at the trial: and they adverted to the case of *Prior v. Moore* (c), that it had been determined that an attorney might sue by attachment of privilege, although his certificate had expired; so that a man may still be an attorney although he may not legally carry on suits for others. The provisions of the 37 *Geo. III. c. 90.* they insisted were all mere matter of regulation, as connected with the stamp duty imposed on the certificate, imposing penalties and disabilities on attorneys who should practise without, and the terms of those very provisions recognized the character of attorney as still subsisting although they should not have been complied with.

On the second point, they insisted that the production of the writ, and three declarations thereon, with three rules to plead, and three *allocatus* of the taxed costs, was sufficient evidence of three actions having been brought, and of the costs on them having been taxed; but they submitted that, notwithstanding the allegation in the declaration was, that certain actions had been brought, it would have been quite sufficient to have shewn that one action had been brought, for that would satisfy the utmost exigency of the averment. That part of the averment stating that they were brought on a bail

(a) 1 Bos. and Pull. N. R.
196.

(b) 3 Barn. and Ald. 702.

(c) 2 Maule and Selw. 605.

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bond, it was urged was merely incidental, and therefore the execution of the bond need not in any respect be proved. But they further insisted that the allegations in the libel rendered it wholly unnecessary to prove any thing which was stated there, or assumed : and in this case the libel itself charged that the Plaintiff issued a writ against the bail ; and that the Defendants in the action on the bail bond were served with notices that declarations were filed against them.

[It was objected that, as that part of the pamphlet was not referred to in the pleadings, or read in evidence, it could not now be adverted to ; but

The Court determined that as the whole pamphlet was put in it might have been all read at the trial, and therefore any part of it might be referred to now.]

As to the objection made to the verdict, founded on the rejection of the Defendant's evidence tendered of the Plaintiff's general bad character, the point on which the new trial was moved for, and which the Plaintiff's Counsel treated as the Defendant's main ground, in support of the alternative of the present motion, they insisted that such evidence was wholly inadmissible, and that whatever *dicta* might be found in the books, in support of such a doctrine, all the sound principles of Law were opposed to it, and that the greatest mischief and inconvenience would result from holding that Defendants might, by putting such pleas, by way

way of justification on the record, impose on Plaintiffs the burthen of such indefinite proof.

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[Wood, *Baron*.—I have very much considered these pleas, and I must say, that I never saw any such before, and hope never to see any like them again. I cannot refrain from thus reprehending them by particularly expressing, in this distinct manner, my marked disapprobation. They are all demurrable, and it was an abuse of the Court to put them on the record*. In requiring the signature of Counsel to special pleas, the Courts expect that they will not put their hands to such pleas as these. It was formerly the practice to apply to the Court for leave to file such pleas by way of justification, as are now only made to require the sanction of the name of Counsel from the confidence which the Courts repose in their discretion. The object of the care and caution required to be used in such pleadings as are allowed to be signed by Counsel, is that they should be so framed as that Judges may know what it is they have to try, and that *facts* only should be put in issue. Thus, if you charge bad character, you must state on what particular acts you found the assertion. How, otherwise, can there be any thing to try. I hope that all the Courts will revive the ancient practice, by making a rule that no plea by way of justification, shall be put on the record, without the leave of the Court being first obtained. I speak advisedly in

* It was stated at the Bar, that the Plaintiff did not demur to the pleas, because he was desirous that his general good character should be put in issue.

saying

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saying this, and I have no hesitation in thus expressing myself on this subject.]

It was urged that there was nothing in the usual allegation in the declaration of the Plaintiff's good name and fame to warrant such pleas, by which new libels were put upon the very record. In the cases which had been cited as authorities, to shew that general evidence might be given of a Plaintiff's bad character, to contradict the allegation of good fame, in mitigation of damages, there was some specific charge stated in the libel, which proof of the general bad character of the Plaintiff in that particular respect might therefore in some measure extenuate.

As a general principle, however, it was established that no such evidence could be received, because it would be generally inconvenient and most difficult to repel it by counter testimony. For that reason it has been held that such a general mode of justification is "contrary to every rule of pleading," and therefore that such a plea was "bad on account of its generality." That is the doctrine of the case of *J' Anson v. Stuart* (a); and in a case of *Snowdon v. Smith* (b), reported by way of note to the case of ——— v. *Moor*, it is stated to have been ruled by Mr. Justice *Chambre*, that on a general plea in *justification*, a witness could not be asked whether there were not reports imputing to the Plaintiff the charge

(a) 1 Term. Rep. 752. (b) 1 Maule and Selw. 286 (*in notis*).
which

which the Defendant had said that he had *heard* respecting him, distinguishing that case from the case of the *Earl of Leicester v. Walter*, because, in the latter, the Defendant had by his plea put the issue upon the truth of the charge imputed. So here the issues are in general justification, and not upon the truth of any particular charge imputed, there being in fact none such in the libel. As to the case of ——— v. *Moor* itself, the true ground of the determination was, that the Plaintiff had chosen to be nonsuited.

It was stated that the doctrine of the case of the *Earl of Leicester v. Walter*, and the determinations on which Chief Justice *Mansfield* with doubt and reluctance proceeded in so ruling the point, had never been approved, and a recent case (not in print) of *Waithman v. Shackell* and others*, was referred

* *Waithman v. Weaver, Shackell, and Arrowsmith.*

This was an action brought by the Plaintiff against the Defendants, who were the proprietors and printers of the *John Bull* newspaper, for a libel attributing to the Plaintiff, amongst other things, the fact of having bought from a man of suspicious character, two shawls for a small sum of money which he had himself sold to another person at a much higher price on the preceding day.

When the Plaintiff's case was closed, and the Defendants' Counsel (*Vaughan*, Serjt. and *Puller*) had addressed the Jury, they proposed to call witnesses—to prove that the libel in this respect was no more than a repetition of rumours which were prevalent at the time of the facts imputed to the Plaintiff therein—in order to diminish the damages, as the Defendants had not justified, in case the Jury should find a verdict for the Plaintiff on the general issue, by removing the impression of malicious inven-

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ferred to, where it was said that the present Chief Justice *Abbott* had expressed his disapprobation of these decisions, and objected to admit evidence of the existence of injurious reports said to be in circulation, to the prejudice of the Plaintiff, tendered in order to diminish the amount of damages.

[*Mr. Baron Garrow* mentioned from recollection two cases, one of *Williams v. Faulder*, and another (who called himself *Anthony Pasquin*) the name of which his Lordship did not state, neither of which were ever in print. In the former his Lordship, then at the bar, proposed to read out of one of the Plaintiff's own works (the book which was the subject of the action) in defending an action brought for a libel on him *as a writer* to shew that he was a defamatory writer, or a writer of defamatory works, which was permitted by Lord

tion in the account complained of. To shew that they were entitled to give such evidence, for such a purpose, they quoted the cases of *Knobel v. Fuller* (a), *Eamer v. Merle* (b); the *Earl of Leicester v. Walter* (c), and *Williams v. Callendar* (d).

The Chief Justice (*Abbott*) is represented to have said that he was not satisfied that he ought to receive the evidence, and that he had always had doubts as to the decisions in the cases adverted to. His Lordship at the same time proposed that the evidence should be offered, that upon his rejection of it, a Bill of exceptions might be tendered which he would sign in order to bring the question before higher authority.

The evidence, however, was withdrawn.

(a) Peake's Law of evidence,
308. App. xliii. (5th Edit.)

(c) 2 Campb. N. P. C. 252.

(d) Holt. N. P. C. 307.

(b) Cited in the *Earl of Leicester v. Walter*.

Kenyon. In the other it was proposed to ask a witness who was supposed to be acquainted with the meaning of certain expressions, insignificant in themselves, but which were intended to convey matter of deep reproach, but Lord *Ellenborough* repressed the question with much impatience.]

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Another objection to this sort of evidence being received in this case, they submitted, was that it was not merely offered in proof of the Plaintiff's general bad character, but to prove that he was as bad as another person (*Hammond*) named in the libel.

As to the rejection of the evidence of the newspaper, it was said that that evidence was not rejected as not being admissible evidence, but as not being proved as stated.

Brougham, Bayly, Abraham and Whateley, in support of the rule, still insisted on the minor objections already stated, particularly that of the Plaintiff not being legally entitled to practise as an attorney; for that he would not be capable of supporting an action for damages sustained on account of an injury suffered in doing what he had not a legal right to do. As well might a smuggler attempt to maintain an action for injury done to him as a trader, by proving loss incurred in a course of contraband dealing.

They relied, however, principally on the main objection, of the rejection, by the learned Judge,
of

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of the evidence tendered on the part of the Defendant to prove the general bad conduct and character of the Plaintiff as an attorney : and they adverted to the case already cited, as establishing that such evidence was admissible, adverting particularly to the language of Lord *Ellenborough* in the case of — v. *Moor* (a); for although that decision proceeds on the election of the Plaintiff to be nonsuited, yet Lord *Ellenborough* there states in terms that “ A person of disparaged fame is not entitled to the same measure of damages as one whose character is unblemished : and it is competent to shew that by evidence.” Mr. Justice *Bayley* also says (and it is the whole which is attributed to him in delivering judgment), “ It was certainly evidence in mitigation of damages.” Although, therefore, the Court refused the rule on the particular ground, the proposition on which the motion was made—that inadmissible evidence had been improperly let in—was distinctly denied. In this case the evidence, if not admissible under the special pleas by way of justification, ought to have been admitted in mitigation of damages on the general issue, which, being *alio intuitu*, is distinct from, and independent of the special pleas in justification, which could not, therefore, be considered to have the effect of narrowing in any respect the evidence admissible on the part of the Defendant, in diminution of the injury alleged to be suffered by the Plaintiff, as the *gravamen* of his action. The case of *Lord Leicester v. Walter*, supported

(a) 2 Maule and Selw. 284.

as it was by the two cases cited there, overthrowing the doubt of *Chief Justice Mansfield* which was grounded on the same arguments as have been this day urged against its admissibility is quite decisive on this point. [They endeavoured to distinguish this case from that of *Waithman v. Weaver*.] On the general issue the Plaintiff is under the necessity of proving his whole case: and, if any part of it be disproved, it would be material in assessing the amount of damages, if the Plaintiff should be proved to have been damaged, which would put aside the pleas by way of justification. The allegation in the declaration of good character, till the libel complained of was published, lets in evidence to contradict it: and nothing can be more easy of proof than that which every man ought to be at all times prepared to prove—a generally good reputation,

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[*GRAHAM, Baron*.—That is an allegation, I apprehend, which could not be traversed:]

The allegation (it was submitted) was altogether unnecessary; and might be safely omitted, as was now the more usual mode of declaring, for the purpose of avoiding the necessity of proving it and the letting in counter testimony; but, being introduced, it would require to be proved, and would render testimony to contradict it admissible.

On the whole they contended that the Plaintiff ought to be nonsuited: or if not; that there should be a new trial, on the ground of the improper rejection of the Defendant's evidence.

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Jervis having replied: The Court took time to consider their judgment.

Adv. vult.

Wednesday,
26th June.

The Court now delivered judgment *seriatim*.

RICHARDS, *Lord Chief Baron* [having stated the case and the pleadings, and what occurred on the trial, and noticed the three principal objections raised and insisted on, proceeded thus,]

The first objection—that the Plaintiff had not sufficiently proved himself to be an attorney, in order to enable him to maintain this action, or rather, perhaps, that he was proved not to be entitled to practise as an attorney—if well founded, must depend wholly on the construction of the Act of Parliament which has been referred to in support of it. There is no doubt that the Plaintiff was once, and that long before the time of the publication of the alleged libel, an attorney, and qualified to practise within the terms and provisions of this statute. There is also no doubt that he did practise as an attorney during the period mentioned in the declaration, and up to and subsequent to the time of the publication complained of. Still the question which has been raised is, whether, although the Plaintiff should be an attorney, and his name be continued on the rolls of the Court, he should not have been shewn to have qualified himself to practise as an attorney, within the restrictions imposed on practising attorneys by this statute :
and

and that must depend entirely on the terms of the Act, and the application of its provisions to the case before us.

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[His Lordship read the several sections of the statute, and pointed out the object of the legislature therein.] All these provisions (continued his Lordship) relate entirely to the obtaining and entering the certificate required to be procured, to enable persons, who should be admitted attorneys, to practise; but neither of them affects the continuance of the character of attorney with which persons having been once regularly admitted are thereby invested, or their *right* to practise at any time when they should do what the statute has required, to render themselves capable of acting as attorneys. They are required to take out certificates: and if they practise without, they are rendered liable to penalties. In one case, indeed (under the 30th sect.) their admission is declared null and void if they omit to take out a certificate for one whole year. Even in that case, however, there is only a suspension of their capacity to act, and it does not wholly destroy their character of attorney, it only imposes on them the necessity of being re-admitted, rendering them incapable of practising till that be done. Even the very imposition of a penalty for practising without a certificate, and indeed every provision of the Act, implies, and proceeds on the assumption, that the person required to take out a certificate, should be an attorney and be clothed with that character.

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In this case I am clearly of opinion that the character of attorney with which the Plaintiff was invested by his admission before the grievances complained of in the declaration, existed throughout the period during which he is there alleged to have been an attorney—that he was so at the time of the publication of this libel, for which the action was brought—and that there is nothing in this statute which could in any sense operate to divest him of that character, in consequence of any omission or neglect on his part, in not complying with any of its provisions in respect of taking out and entering his certificate. I consider that the Plaintiff is proved to have been, and that he was, as he states in his declaration, *an attorney of the Court of King's Bench* at the time of the grievances therein complained of, and consequently I think that there is no ground for entering a nonsuit upon that point.

As to the other objections which have been made on the ground of there not having been sufficient proof of the other collateral averments in the declaration, I may dispose of them at once, by saying that I can not see anything in them that requires observation; for the subject matter of them was wholly immaterial.

Upon the other objection to the verdict, which is now made the ground of an application for a new trial—that evidence of the Plaintiff's general bad character was refused to be received at the
trial

trial—I have still a very decided opinion. I am fully aware of the decisions upon that point to which we have been referred in argument. I cannot, however, hold them to be declaratory of the Law of *England*, in establishing any such doctrine upon the subject of evidence, and I sincerely hope they never will. I shall certainly not extend them by any authority of mine. I cannot assent to a doctrine which would go to permit persons to be guilty of slander, under pretence of mitigating damages, on the plea of the general issue; and to allow Defendants to impeach all the transactions of a man's life who may have occasion to seek redress in Courts of Justice, and throw on him the difficulty of shewing an uniform propriety of conduct during all his existence. It would be impossible for any man to come prepared to meet such a charge. Witnesses may be brought to answer the immediate purpose of the day, and to prove an answer to particular allegations; but is a Plaintiff on such an occasion as this to come to the trial of his cause surrounded by a host of friends and acquaintances, consisting of all persons who may ever happen to have known any thing of him, and to bring them from *Staffordshire* for such a purpose, and in a case where no such issue was taken? Such a notion is quite absurd and inconsistent with all the principles of English Law.

There being several pleas by way of justification on the record, I suffered witnesses to be examined in support of specific allegations contained in some of them: and I now much lament that I did so,
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I have been told by better judges on such points that I did wrong; for although the pleas were not demurred to, there is not one that can be supported in law. When, however, on the trial the question was put to Mr. *Chetwynd* who was called as a witness, respecting the general character of the Plaintiff, I felt myself bound in duty to interpose to prevent it, although the Counsel for the Plaintiff did not object to it; because I considered it subversive of the integrity of the law to allow such a question to be asked.

Then it is said that, although such an examination may be inadmissible in support of the special pleas, it ought to be received in diminution of damages. The same answer, however, may be given to that argument, that a Defendant can in no case be entitled to call on a Plaintiff to vindicate the history of his whole life, because the Defendant have pleaded a general denial of the charges alleged in an action for slander.

I am therefore of opinion that this rule must be discharged.

GRAHAM, *Baron*.—Upon the first question which has been made in this case, I shall only say that I think the *Lord Chief Baron* has very clearly and fully explained the ground upon which that rests: and I entirely concur in thinking that the Act of Parliament which has been adverted to, does not in any case deprive the person who has been once admitted an attorney, of his professional character
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of attorney, but merely suspends it for a time. He still continues an attorney, and may at any time practise again on certain terms. By re-admission he is not made a new attorney, he is merely restored to his capacity to act. I am therefore of opinion, that, even during the suspension of his right to practise as an attorney, he was still an attorney, although he could not legally act in conducting causes, but would be subject to penalties if he did; and that therefore the Plaintiff was entitled to maintain the present action, brought by him as an attorney, which I consider him to have been from first to last.

I shall now proceed at once to the principal objection made to the verdict which the Plaintiff has obtained, as raising a point of very great importance, and one which, it is time, should be determined one way or the other, as it is always recurring upon every case of this sort. Upon this point I am happy to find my own opinion confirmed by that of the rest of the Court, which is, that such evidence is certainly not admissible, in any case, under any circumstances; either in mitigation of damages upon the general issue, or in support of any allegation put upon the record by way of justification. With the highest respect for the great Judge whose authority introduced this doctrine in the first instance, I have never been able to reconcile my mind to it, and I believe it has not influenced the opinion, nor met the approbation of any of the Judges of the other Courts. I have certainly myself let in this sort of evidence at *Nisi Prius*

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Prius in deference to that authority in the case of a person whom it was proposed to prove a reputed thief, which was proved. Now, however, that I am called upon to give my opinion (in which I am glad to find myself supported by my *Lord Chief Baron* and my Brothers) upon this point, in a solemn manner, I am bound to state that I think that this sort of evidence is most clearly not admissible in any case. In the case of the *Earl of Leicester v. Walter*, I, for one, must observe, at the same time, there is certainly some distinction from the present, considered with reference to the nature of the evidence offered there, and the charge and the averments stated in the pleadings, and the same subject-matters of consideration now before us in this case. In *Lord Leicester's* case the libel imputed a positive offence, and the declaration stated that, by reason of the publication of the libel, the Plaintiff's neighbours had refused to associate with him as they were used to do. Now it happened in point of fact, that there was too little foundation in truth for that averment: and it might, when it caught the eye of the learned Judge, have influenced him in determining to let in the evidence to negative the allegation in mitigating the damages. The kind of evidence offered in this case (which is very distinct in its circumstances) is of a very different and more general nature, and if rendered admissible by a positive rule of evidence, would be most injurious in its consequences, as it would enable the slanderer to destroy the best reputation in the world. I think it impossible to make any sound distinction between direct calumny and spreading evil reports,

reports, and it must not be overlooked that this sort of evidence is always offered at a time, and under circumstances when the party is utterly unprepared to disprove it. At the same time I do not think we can borrow much authority from the case of *Waithman v. Shackell*, where two distinct facts were singled out for proof, and they ought to have been put on the record. I do not consider, therefore, that the rejection of the evidence in that case by Chief Justice *Abbott* is quite applicable to the present question, or that it has much impugned the authority of the former *Nisi Prius* decisions,

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On the present occasion there is a full concurrence of opinion amongst the whole Court, that such general evidence of bad character, whether offered on the general issue, or in proof of matter pleaded by way of justification, is not admissible; and that principally on the grounds that a party cannot be expected to be prepared to rebut it: and that if it were received, any man might fall a victim to a combination made to ruin his reputation and good name, even by means of the very action which he should bring to free himself from the effects of malicious slander. So far, therefore, from leaving to slandered persons the only means of reparation in their power—the fair trial of an action by a Jury of their country—such a proceeding would be rendered not only wholly ineffectual, but far more mischievous in its effects than the original calumny itself.

WOOD, *Baron*.—I am clearly of opinion, that there is no ground whatever for the present motion
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for a nonsuit, on the two points reserved : or for a new trial in this case.

Two objections have been taken, and urged as reasons why the Court should direct a nonsuit to be entered ; the *Chief Baron* having reserved those objections for the consideration of the Court. The first is, that the Plaintiff was not proved to be an attorney at the time of the grievances charged. There can be no doubt, however, that he was an attorney at that time, for it was proved by the book of admissions produced by the proper officer. But then it was said, that he had not taken out and entered his certificate in due time, according to the provisions of the 37th of *Geo. III.* ch. 90., and therefore could not maintain this action. If he had not complied with the regulations of that statute, that would not have the effect of taking away from him altogether his character of an attorney. The consequence of that omission would be, that he might be subject to a penalty, and that he could not bring an action for fees and disbursements ; because, under those circumstances he would be disabled from so doing, by the provisions of that statute ; but, still he is not to be subjected, in addition to such penalty and disability, to be aspersed and ruined in his character of an attorney.

As to the objection, of there having been no proof that three actions had been brought—how does that stand in point of fact ? A writ was given in evidence, in which there were three Defendants. That might be a proof of several actions having been

been commenced, or of one. *Stat indifferenter* upon the face of the writ : but the objection is a very curious one in this case ; for if we look at the Defendant's own libel, we shall find that the very foundation of the charge made against the Plaintiff, is that he brought three actions instead of one ; and the Defendant objects, that the Plaintiff does not prove the statement in the Defendant's own libel, as if it would be less a libel, because both the foundation and superstructure were false. But the fact was proved ; for the Master's allocatur, and the three rules to plead, were sufficient evidence of there being three actions. There is also another answer to it. If the Plaintiff had failed to establish that fact, it is an allegation which it was unnecessary to prove with respect to one count in this declaration, and that would have been sufficient to support the action. I am of opinion however, that it was fully proved.

Then it was contended that there ought to be a new trial in this case ; because, as it is said, the evidence which the Defendant offered to give, of the general bad character of the Plaintiff, was rejected. It was said by Mr. *Brougham*, abandoning the special pleas by way of justification, that such evidence might be given under the general issue in mitigation of damages ; and Mr. *Bayly* says, that every man is presumed to come prepared to give evidence of general good character ; and therefore no difficulty would be imposed on a Plaintiff in requiring him to do so, in such a case. Mr. *Abraham* was still bolder, and asserted that such evidence might

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might be given, not only on the general issue, but also under the special pleas, because the Plaintiff had stated in his declaration the usual averment, that he was a person of good name, fame, and credit, and that he was therefore bound to prove it. This is new doctrine to me. I have ever understood, that general good character is always presumed in law; unless, by evidence of particular acts, fairly and specifically put in issue, that presumption is negatived. Some cases have been mentioned, wherein it should seem that such evidence has been received at *Nisi prius*. I will not attempt to distinguish the present case from those. I strongly protest, however, against any such mischievous doctrine altogether: and deny that it has any legal foundation. It cannot be supported on any principle of Law. I say, distinctly, that it is not warranted by the Law of the land: and whatever cases may be cited to support such doctrine, I cannot assent to them. When I am told by the House of Lords (who, I presume, would take and act upon the opinions of the Judges,) that such is the Law, I will then (as I must) submit to consider it to be the Law; but certainly not till then.

If, as contended for, you could call witnesses, upon the plea of not guilty, to contradict the general introductory words, upon pretence of mitigating damages—what would be the consequence? We should have counsel getting up, and saying—“the Plaintiff has alleged (as in the present declaration) ‘that he is a good, honest, just, and faithful subject of the realm’. I propose to call twenty witnesses,
to.

to prove that he is an immoral dissolute man—twenty more, to prove that he has committed acts of dishonesty—twenty more, to prove that he is not just in his dealings—and twenty more, to prove that he is not a faithful subject, by proving that he has been guilty of sedition, treasonable practices, and even high treason”. Did any one ever hear such stuff as this? It might do in a farce upon the stage, meant to excite laughter, but it surely cannot be tolerated in a Court of Justice.

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On the point of pleading, the case of *J'Anson v. Stuart* in the *King's Bench*, (1 Term. Rep. 748,) furnishes sound doctrine, and the true distinction is there taken. In that case (which was an action for a libel, brought in the *Court of Common Pleas*), the libel consisted of general charges, which were set out in the declaration. The Defendant pleaded a justification, in terms as general as the charge: and the Plaintiff demurred specially, because no particular facts were shewn. The *Court of Common Pleas* overruled the demurrer. The Plaintiff brought a writ of error in the *King's Bench*, and that Court reversed the judgment of the *Common Pleas*. [His Lordship stated the particulars of the case cited, with great minuteness, reading emphatically the following passages of the judgment, as delivered by Mr. Justice *Ashhurst*.] “ This plea is bad, on account of its generality. The substance of the libel is, that the Plaintiff was a common swindler, and, that he, in concert with others, defrauded divers persons. One part of the Defendant's argument has been, that this plea is only as
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general as the charge in the declaration. But it is to be observed that it is the charge of the Defendant, and the Plaintiff was bound to state it as it was made. And it does not follow, that the Defendant ought to justify in so general a way. The Defendant is *prima facie* to be considered as a wrong doer. When he took upon himself generally to justify the charge of swindling, he must be prepared with the facts which constitute the charge, in order to enable him to maintain his plea. Then he ought to state those facts specifically, to give the Plaintiff an opportunity of denying them; for the Plaintiff cannot come to the trial prepared to justify his whole life. If the Plaintiff had been a common swindler, the Defendant ought to have indicted him, but he has no right to libel him in this way". [His Lordship also stated much of the judgment pronounced by Mr. Justice *Buller* to the same effect; observing that the following sentences required particular attention, as bearing immediately and strongly upon the case before the Court.] "The first question here is, whether the Defendant is at liberty to charge the Plaintiff with swindling, without shewing any instances of it. That is contrary to every rule of pleading, for wherever one person charges another with fraud, he must know the particular instances on which his charge is founded, and therefore ought to disclose them." Those are observations which might be made on these pleas, as might the following also. "Now, in the present case, if this plea were to be suffered, it would be to allow any person to libel another more on the records of the Court than he could do in a public

public newspaper. If the Plaintiff has been guilty of any act of swindling, the Defendant must be taken to know them. He could not prove the justification, as he has pleaded it by general evidence; but he has no justification unless he can prove the special instances; and knowing them he ought to put them on the record, that the Plaintiff might be prepared to answer them". In another part he speaks thus: "It is not true, as was contended, that the general character of the Plaintiff is put in issue; for the evidence to support the Defendant's plea must be special".

We have therefore in that case (continued his Lordship) which was well considered, and solemnly determined upon a writ of error, an authority that such general pleas are not sufficient (*a*).

Then it was said, that if the Defendant had no right to plead a justification in such general and indefinite terms in bar of the action, he might still give evidence to the same effect, under the general issue in mitigation of damages;—in other words—although you cannot plead it to avoid damages being given against you, you may give it in evidence in order to diminish them. Now I take upon myself to deny all that. There exists no such distinction in law: and I hold that you can no more be permitted to give particular or general evidence of that nature in mitigation of damages, than to plead it in bar of the action; and for the same obvious reason, viz. that the plaintiff cannot come prepared to meet it. It would be to allow persons

(*a*) Et vide *Morris v. Langdale*, 3 Bos. and Pull. 284.

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to slander others more effectually and diffusely in Courts of Justice, under pretence of mitigating damages, for slander cast on them in other places.

I will now make some further observations on the pleadings in this case :—and first of the declaration. Gentlemen who draw declarations, ought in all cases to attend particularly to the evidence by which they are to support them, and to frame the several counts according to the nature of the particular case. They would not then introduce any unnecessary averments which serve no other purpose than to entangle the cause and perplex the Judge whose duty it may be to try it. This declaration might have been drawn in such a way, as to have required no other evidence to support the case at the trial, than the mere production and proof of the publication of the libel itself.

I have seen indictments and declarations drawn by the ablest pleaders, and particularly, amongst others, by Mr. *Wallace*, heretofore *Attorney-General*, who was as conversant in the principles of the common law, and as skilled in the science of pleading as any man : and he sanctioned the mode of pleading I shall mention. If this declaration had stated—that the Defendant published a libel of and concerning the Plaintiff, &c: imputing to the Plaintiff certain practices, by him, in the libel supposed to have been committed by the Plaintiff acting in his character of an attorney; and of and concerning certain actions therein supposed to have been brought by him—it would have rendered no other evidence

evidence necessary, than proof of the publication of the libel, which, on being produced to the jury, would have made out the Plaintiff's case. At first glance it might be thought that the word "supposed" was too indefinite; but, when we consider that it is not incumbent on the Plaintiff to prove what the Defendant makes the foundation of his libel; but on the Defendant, who is to justify it (if he can); it is sufficient to state what the Defendant has alleged or supposed; for it is not the less a libel if the supposition be false or not proved. Of late, Courts in order to get over these positive introductory averments, have held, and very properly, that the libel itself is proof of them, if it goes to the length of stating what is positively averred, or so far as it does go.

I am also of opinion, that every one of the special pleas, by way of justification, which the Defendant has pleaded, is bad: and I say that it was the duty of the Plaintiff's counsel to have demurred to them. If they had been demurred to, I can have no doubt but the Court would have held them all to be bad; in which case, the record would have gone down to trial on the general issue: and, if the declaration had been framed as I have suggested, the Plaintiff would have had nothing to prove but the publication of the libel—the *Chief Baron* having properly rejected the general evidence tendered by the Defendant's counsel.

I know that some persons think, that by demurring, the Plaintiff would consequently admit the truth

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truth of all the slanders contained in these bad pleas. That is quite an erroneous idea. The party demurring confesses nothing, but that which is *well pleaded*. To illustrate that—If the demurrer is to a declaration which is *good* in point of law, and the demurrer is overruled, the allegations in the declaration are admitted, and you have no occasion for further proof, but you go on without more to a writ of inquiry. If the demurrer is to a plea *well pleaded*, and the demurrer is disallowed, the plea stands as a bar, without further proof of the facts. It is quite absurd to suppose, that by demurring to a bad plea by way of justification, in an action of libel or slander, you confess the matters of the slander to be true. That is not the legal effect or operation of a demurrer. The demurrer is no more than saying that the plea is impertinent, and the law does not require you to give any answer to it.

With respect to other mischievous consequences also well worthy of consideration arising from this sort of pleading—I will observe, that the effect of it in the present instance has been, that by unnecessary averments in the declaration, and suffering these invalid pleas to remain on the record without demurring to them, this very cause, which would not under judicious pleadings have occupied two hours, lasted I am told the whole day.

I am for these reasons clearly of opinion, that this rule must be discharged in all its parts, upon every point.

GARROW,

GARROW, *Baron*.—It but very feebly expresses my sentiments on the result of the discussion of this case, to say that I very cordially concur in all that has been this day so ably said by my *Lord Chief Baron* and my Brothers, in delivering the very sound and learned judgment which we have just had the benefit of hearing pronounced, by each of the members of the Court whom it is my misfortune to have to follow, in the few words which I think it necessary to add on so very important an occasion. The very luminous and elaborate judgment of my brother *Wood* in particular, I will take the liberty of saying has most usefully and forcibly illustrated the principles of a science in which he has long been eminently conversant: and has furnished a valuable admonition in respect of its practical doctrine to the rising generation of lawyers, founded on the best models, the simple structure of the pleadings of earlier times, as drawn with good sense and sound discretion by plain matter-of-fact men, unencumbered with useless and perplexing allegations. Such doctrine must have the effect, if duly attended to and appreciated, of redeeming our records from the obloquy which has been for some time, perhaps too justly, cast upon them. In no period of the judicial life of my learned Brother, has he ever given a judgment which will be read with more satisfaction and instruction.

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Upon the first objection of moment which occurs, that the Plaintiff was not entitled to be considered an Attorney, I can only say, as has been already observed, that notwithstanding his non-compliance

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with the provision of the act of parliament on which the objection is founded, he was nevertheless still an Attorney: and that there is nothing in the statute which prevents him from suing a slanderer for damage sustained by him in his business of an Attorney. I should, for one, require an express provision to that effect, to exclude him from thus seeking redress in such a case. The argument used in support of the objection really amounts to this, that the legislature allows uncertificated Attorneys to be libelled with impunity. There may be, and are many very respectable Attorneys who do not every year take out and enroll their certificates; and even where Attorneys practice illegally without certificates enrolled, the proceedings are not void because they are still Attorneys, and as such are subject to penalties.

The objection founded on there having been no proof of three actions having been brought, has been well disposed of by my Brother *Wood*. There is therefore clearly no ground for a nonsuit, and thus we get rid of the first branch of the application.

We then come to what we must consider, after the authorities which we have been referred to in support of it, a question of much importance, raised by the objection on which the motion for a new trial has been founded.

For my own part, I never had but one opinion on that subject. That such evidence should be admitted

mitted on the plea of the general issue in pretence of mitigating damages, seems to me to be really quite absurd. The very able reasoning of the Judges who delivered their opinions in the case of *J Anson v. Stuart*, is quite conclusive on the point of the total inadmissibility of evidence of bad character, even in respect of a particular charge. In this case the evidence proposed, was general evidence of the Plaintiff's bad character, in the practice of his profession and business of an Attorney. Now if there could possibly be any class of men to whom good fame and fair character—which is beyond price to all men—be of more value than to others, it is so in an especial manner to men engaged in the practice of the profession of the law. They are undoubtedly sometimes called on to administer to the bad passions of mankind, and obloquy when cast on them finds a readier ear, because there are many amongst the public who are predisposed to entertain very much disaffection towards all who exercise the business of an Attorney, and there certainly are, it must be admitted some amongst them, whose conduct does not tend much to discourage that feeling to their prejudice. The more therefore do such practitioners as deserve it, by conducting themselves with honor and integrity, require to be protected in their good name and fame. It would be no difficult matter I fear, for an angry man who libels an Attorney, to find many persons who would be ready to come forward in support of his defence of general bad character to an action brought against him, and to swear that the Plaintiff was a man of general bad character in his

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his profession, some of whom perhaps might conscientiously think so, from having heard rumours to his prejudice, from clients who might have been unjustly disappointed in the result of their litigation. Can it be right then, that such evidence should be held to be admissible against a man who is obliged either to sue, or suffer an unfounded calumny? I join most readily in the hope that that never will be considered to be the Law of *England*. If ever it should, the libeller will become a much more general character than we find him now; for he will derive protection, and impunity from the apprehension and dread, with which the object of his malice would naturally be possessed, of resorting for redress to Courts of Justice, to vindicate his name, where it would be permitted to the Defendant to bring forward testimony of general bad character, which from its nature it would be impossible to disprove; whereby they in effect become the means of putting the libels of which they complain on the records of the Courts, and giving a wider circulation to the calumnies contained in them, with the additional matter made the ground work of a defence. It ought to be allowed to all well conducted men, to come to Courts of Justice to clear their character from aspersions, without fear or dread, as a place to which they may safely and therefore cheerfully resort to re-establish their reputation.

Rule discharged.

* * * After Judgment had been delivered in this case, Mr. Baron *Wood*, who had much impressed the

the rest of the Court by the zealous and able manner in which he had given his opinion, and the learning which he had displayed in his reasoning on the several points which were made, had the honour to be gratified by the tribute of a singular compliment paid to him by the Court.

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The *Lord Chief Baron*, on the conclusion of Mr. Baron *Garrow's* judgment, rose from his seat, and, addressing Mr. Baron *Wood*, publicly congratulated the venerable Judge on the unimpaired vigour of intellect, and unabated learning, which he had evinced this day in the discharge of his high duties. His Lordship then expressed the thanks of himself and his Brothers, to the learned Baron, for the very effective and decisive part that he had taken in the determination of the important questions raised by the objections which had been the subject-matter of the argument on this Rule.

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The ATTORNEY-GENERAL v. M'KENZIE.

[On Demurrer and Special Verdict.]

Wednesday,
26th June.

Judicial construction of the Act of Union between Great Britain and Ireland (39 and 40 Geo. III. ch. 67,) as to the footing on which the two countries are to be legally considered to have been placed with respect to each other, in matters of Trade and Commerce, by the Operation of that Statute:

THE question raised by the facts and pleadings in this case, and argued upon the special verdict which had been found, was,

“Whether the spirits mentioned in the record (spirits made in *Ireland*, and imported into *England*), were in point of law to be deemed *British* spirits, and subject as such to the restrictions and limitations which the *British* acts of parliament had imposed in respect of *British* spirits, previous to the Act of Union?”

Held, that the Legislature, by the 6th Article of the Act of Union, with reference to the

treaty on which it was founded, intended to place both countries on an equal footing of advantage and disadvantage, in respect of articles of the manufacture and trade of either, when exported from one into the other—that such intention is sufficiently expressed in the words of the statute to enable the Court to give effect to it—and that the statute must be construed as *having established* a perfect reciprocity of advantage, and consolidation of interests in respect of the commercial intercourse of the two countries, and to have placed them both in all respects on a level as to their mutual traffic and dealing, by the effect of the imposition of countervailing duties, and by the virtual re-enactment of the previous acts of Parliament, regulating the trade in *British* produce:

Therefore, (*exempli gratia*) when spirits distilled and made in *Ireland*, are imported from thence into *England*, they become *British* Spirits, and are entitled as such to all the advantages of *British* Spirits, but are subject to all the Excise regulations affecting *British* Spirits, existing at the time of the Act of Union; as, for instance, to the provisions of the 26th of Geo. III. ch. 73.

* 26 Geo. III. ch. 73. sec. 34, “Provided always and be it enacted by the authority aforesaid, That if any *British* Spirits (other than and except raw or unrectified spirits, or spirits of Wine which have been lawfully received by Permit, according to the directions of this Act, or of an Act passed in this Session of Parliament, intituled ‘An Act to discontinue for a limited time
‘the

Groves, being an officer of Excise, did, between the first day of *January* 1801, and the day of exhibiting the information (the sixth of *July* 1801), to wit, at *Westminster*, &c. seize to the use of his said Majesty, as *forfeited*, a large quantity, to wit, one hundred and twenty gallons of spirits, together with a certain cask containing the same. For that the said spirits being *British spirits*, and *not being raw or unrectified spirits, or spirits of wine*, which had been lawfully received by permit according to the directions of a certain act of parliament made and passed in the *twenty-sixth year* of the reign of his said Majesty, and in the third session of the sixteenth parliament of *Great Britain*, intituled, “An Act to discontinue for a limited time, the payment of the duties upon low wines and spirits for home consumption, and for granting and securing the due payment of other duties in lieu thereof, and for the better regulation of the making and vending *British Spirits*, and for discontinuing for a limited time certain imposts and duties upon rum and spirits imported from the *West Indies*,” or of an act passed in the same session of Parliament, intituled, “An

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‘the several duties payable in Scotland upon low Wines and Spirits, and upon Worts, Wash, and other Liquors there used in the distillation of Spirits, and for granting to his Majesty other duties in lieu thereof) or any mixture of *British Spirits* with Foreign Spirits, shall be found in the custody of any dealer or dealers in Spirits, not being a rectifier or compounder of *British Spirits*, exceeding the strength of one in eight under hydrometer proof, the same, together with the casks and vessels containing the same, shall be forfeited and lost, and shall and may be seized by any officer or officers of Excise.’”

“Act

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“ Act to discontinue (in the same manner) the duties payable in *Scotland* upon low wines and spirits, and upon worts, wash, and other liquors there used in the distillation of spirits, and for granting to his Majesty other duties in lieu thereof,” were then and there, to wit, on the said sixth day of *July* (1801), to wit, at *Westminster* aforesaid, found in the custody of one *Andrew John Mackenzie*, he then and there being a *Dealer in spirits*, and not then being a *Rectifier* or compounder of *British* spirits exceeding the strength of one in eight under *hydrometer* proof, that is to say, of the strength of one to four over *hydrometer* proof, contrary to the form of the statute in that case made and provided; whereby, and by force of the statutes in that case made and provided, the said *British* spirits so seized as aforesaid, together with the said casks containing the same, then and there became forfeited, and liable to be seized by any officer or officers of excise.

The fourth count stated that the said spirits not being raw or unrectified spirits, or spirits of wine, which had been lawfully received by permit according to the same acts of parliament, and the same spirits having been after the 1st day of *January* 1801, and before the said 6th day of *July*, distilled and made in *Ireland*, and imported from thence into *Great Britain*, were then and there found in the custody of the Defendant, then and there being a dealer in spirits, and not being, &c. [concluding as in the first count].

The Defendant pleaded as to the first, second,
and

and third counts of the information, that the said spirits, in those counts respectively mentioned to have been found in his custody, *were not British* spirits in manner and form as therein alleged [concluding to the country]: and as to the fourth, fifth, and last counts of the said information, that the said spirits in those counts respectively mentioned, *were distilled and made in Ireland after the 1st day of January. 1801, and imported from thence into Great Britain* in manner and form as is above in the said information alleged, and that upon the importation of the same into *Great Britain from Ireland*, the duty required by law in that behalf had been and was paid, to wit, at *Westminster, &c.* as he was ready to verify; Wherefore he prayed judgment, and that the hands of the King might be amoved from the said spirits, &c. in the fourth, fifth, and last counts of the information mentioned, and that he might be restored to the possession of the same, &c.

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The *Attorney General* joined issue on the three first counts, and demurred to the three last.

On the trial of the issues, the jury found specially as to the spirits in the *first, second and third counts* of the Information, that such *spirits were distilled and made in Ireland and imported from thence into that part of Great Britain called England, between the first of January 1801, and the time of the seizure thereof in the Information mentioned.* And they found that upon the Importation into *England from Ireland*, the duties required

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ed by law in that behalf were paid, finding the seizure, &c. &c. and that the spirits in these counts mentioned, were at the time of the seizure in quantity and quality as stated in the Information:—referring the question to the Court whether the Spirits in the said counts respectively mentioned to have been so found in the custody of the Defendant, were *British* Spirits in manner and form, &c.

Friday,
May 10.

The question came on for argument this day, when

Walton argued it on the part of the Crown, and

Tindal for the Defendant.

After the argument the case stood over to another day that the question might be again argued: and now

The *Attorney-General* was heard in support of the Information, and

Shadwell, contra.

Friday,
June 21.

On the part of the Crown, this question was submitted to be one of very great importance as it respects the spirit trade and the Revenue of Excise both in *England* and *Ireland*, and it was put as being in effect whether in point of Law *Irish* spirits, having paid the duty in *Ireland* were made liable by the Act of Union, to a further counter-vailing duty when imported into this country as being

being *British* spirits. That point it was said would depend mainly upon the true construction of the statute passed for the Union of the two countries, aided by the construction of other statutes as connected with the subject-matter of the question, and its determination would dispose at once both of the demurrer and the special verdict.

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The circumstance of the seizure in question having taken place very shortly after that Act passed, it was observed, had very considerably narrowed the point raised for the opinion of the Court.

The Court were first referred to the Excise regulations which existed by law in this country, with respect to the trade in spirits at the time when the Act of Union was passed. Until that period, spirits which were permitted to be imported into this country for home consumption, were of two kinds only, Foreign spirits, or such as were manufactured out of this country, and *British* spirits, or such as were manufactured in it. Foreign spirits were subjected, in order to protect the home trade, to a higher rate of duty, and also to different regulations from spirits manufactured in *England*. Foreign spirits, besides being subjected to a higher duty, could only be imported of a certain strength. The duty, however, in all cases both upon Foreign and Home-made spirits was, and still is, calculated, not according to the strength of the spirits, but according to the quantity, which was noticed

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noticed as a distinction very material to be kept in view in the consideration of this case.

Foreign spirits could not by the statute of the 26th of *Geo. III.* be imported into this country of a strength beyond a proportion of one to nine over hydrometer proof. By the 60th sec. *British* spirits were chargeable with duty, and the charging of the duties on *British* spirits in the hands of the distiller was thus explained. The distiller who distils his spirits from the wash, is allowed to distil nineteen gallons of spirits of a certain strength from every one hundred gallons of wash. When the duty is charged the officer of Excise ascertaining on the distiller's premises the quantity of wash he has, charges the duty after the rate of nineteen gallons of spirits for every one hundred gallons of wash, those spirits being above the strength of one to ten over hydrometer proof; and if at the end of the year in taking the account of the quantity of spirits distilled, the officer finds that it exceeds the quantity which the law allows, the distiller is now as formerly chargeable with the same duty upon the excess, as he pays upon the quantity of spirits which he ought regularly to have distilled from the given quantity of wash.

From the distiller the spirits get into the hands of the rectifier, where they undergo a further process to fit them for consumption. They must go from the distiller to the rectifier of a strength of one to ten over hydrometer proof, which is ascertained by suspending the hydrometer in the fluid,
and

and if it sinks to a given point, it is then said to be proof, and that quality is produced by adding a sufficient proportion of water to the spirit, to reduce it to the point zero. Foreign spirits are chargeable with duty at proof: home made spirits are allowed to be distilled at a strength of one to ten over hydrometer proof.

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Unrectified spirits being charged at the rate of one to ten over proof; when they go from the distiller to the rectifier, the duty having been charged and paid, the rectifier is entitled for every one hundred gallons of spirits he receives from the distiller, to send out from his warehouse one hundred and fifty gallons of rectified spirits received by him of the strength of one to ten above hydrometer proof of the strength of one to eight under; for he may reduce the distilled spirits so far below zero, by adding an eighth part more of water than would be required to bring the hydrometer to the point of zero. The article, therefore, for home consumption, must be brought into the market of the strength of one to eight under hydrometer proof, the point which the Legislature has settled as being the proper strength for spirits to be consumed in *England*, and spirits above that strength found in the hands of dealers, are made liable to forfeiture.

So the law stood at the time of the Act of Union. *Irish* spirits at that time were Foreign spirits, and therefore could only be imported from *Ireland* into this country of a strength of one to nine

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nine over hydrometer proof, being liable to the same rate of duty imposed upon Foreign spirits at proof, which was a duty of 8s. 1d. per gallon : and if they came to this country of a higher strength than proof, which was ascertained by the hydrometer, the number of gallons upon which they were to pay duty, was calculated according to what the quantity ought to have been, if reduced to proof. Thus the quality of the spirit is the only criterion of the quantity upon which the duty is to be paid. *Irish* spirits were subject to all the regulations and impositions made with respect to Foreign spirits, until the time of the Union.

Upon the treaty previous to the Act of Union, the commercial intercourse between the two countries became a most material point of consideration ; and by one of the Articles of the Union, it was stipulated between the two countries, that the commodities of both, should, in each, be placed upon an equal footing in respect of the advantages which each possessed before the Union, reciprocally ; that the *Irish* commodities when brought into this country, should, for the purposes of trade, be considered as commodities manufactured here, coming into market with the same advantages, and should be subject to the same regulations as *English* commodities. For that purpose, it is by the 6th Article of the Act of Union, the 39th and 40th of the late King, stipulated, "That his Majesty's subjects of *Great Britain* and *Ireland*, shall, from and after the 1st day of *January* 1801, be entitled to the same privileges, and be on the same footing

as to encouragements and bounties on the like articles being the growth, produce, or manufacture of either country respectively, and generally in respect of trade and navigation in all ports and places in the United Kingdom and its dependencies; and that in all treaties made by his Majesty, his heirs and successors, with any Foreign Power, his Majesty's subjects of *Ireland* shall have the same privilege, and be on the same footing, as his Majesty's subjects of *Great Britain*."

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In order to place the different commodities upon the same footing in each country, it was necessary that countervailing duties, as they were called, should be established, as for instance, in this case, upon spirits. Spirits made in *Ireland*, were liable to less duty in *Ireland* than spirits made in *England* were in *England*, therefore, the Legislature to put them upon a footing when *Irish* spirits came to *England*, must necessarily lay on such a countervailing duty as should make the whole duty on *Irish* spirits, equivalent to the duty paid on *English* spirits. It is therefore stipulated "that all articles, the growth, produce, or manufacture of either country (not hereinafter enumerated as subject to specific duties)"—there were some articles which it was thought right to say should be subject to specific duties—"shall, from thenceforth, be imported into each country from the other, free from duty, other than such countervailing duties on the several articles enumerated in the schedule, number One A. and B. hereunto annexed as are therein specified, or to such other countervailing duties as

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shall hereafter be imposed by the Parliament of the United Kingdom, in the manner hereinafter provided ; and that for the period of twenty years from the Union, the articles enumerated in the Schedule, number Two, hereunto annexed, shall be subject on importation into each country from the other, to the duties specified in the said Schedule, number Two."

By another part of the same article, it was provided, that any articles of the growth, produce, or manufacture of either country which are or may be subject to internal duty, or to duty on the materials of which they are composed, may be made subject on their importation into each country respectively from the other, to such countervailing duty as shall appear to be just and reasonable in respect of such internal duty or duties on the materials ; and that for the said purposes, the articles specified in the said Schedule, number One A. and B. shall be subject to the duties set forth therein, liable to be taken off, diminished, or increased, in the manner herein specified, and that upon the export of the said articles from each country to the other respectively, a drawback shall be given equal in amount to the countervailing duty payable on such articles on the import thereof into the same country from the other, and that in like manner in future, it shall be competent to the United Parliament, to impose any new or additional countervailing duties, or to take off or diminish such existing countervailing duties as may appear on like principles to be just and reasonable, in
respect

respect of any future or additional internal duty on any article of the growth, produce, or manufacture of either country.

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By the eighth Article of the Act of Union, it is provided, "that all the existing Laws in both Kingdoms shall remain in force." Thus it was urged, spirits being liable to a less duty in *Ireland* than in *England*, in order to place spirits made in *Ireland* when imported into this country, upon the same footing, and to enable them to come into the market upon the same terms, there was a countervailing duty imposed, in language not to be misunderstood. That principle of equalization, it was said, has been acted upon by the Excise, as the acknowledged basis of the law. The words of the Article in the Schedule (which must be considered as notice to *Ireland*) are :—

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"SPIRITS, *British*, for every gallon, *English*
 " wine measure, of spirits, *aqua vitæ*, or
 " strong waters, which shall be distilled or
 " made in *Ireland*, and imported at a strength
 " not exceeding one to ten over hydrome-
 " ter proof

s. d.
5 1½

" Note—Spirits above the strength of one to ten will be charged in proportion, and on sweetened or compounded spirits, the duty will be computed upon the highest degree of strength, at which such spirits can be made."

That provision was explained to be intended to fix the strength of sweetened spirits; the strength of one to ten, is thereby made the criterion of the quantity of water the distiller must add to the spirits before he can send them to the rectifier, and therefore he is chargeable with that quantity, as-

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certaining by the strength of it, which the hydro-
meter marks, the quantity of spirit to be made.
So as to the *Irish* spirits which are made *English*
spirits by this Act: but as the sweetening and
compounding spirits baffle the hydrometer, spirits
so qualified are fixed at the maximum.

It was submitted that it would be very material
upon this question, to consider what was the na-
ture of the contract between the two countries,
which would be found to be a complete mutuality
and reciprocity of advantage in trade as to the
manufactures of both. *Ireland* could not compete
with *England* in the *English* market because *Irish*
spirits were subjected to the higher rate of duty at
which Foreign Spirits were charged. The *Irish*
therefore required to be enabled to bring spirits
into the *English* market. *Great Britain* assenting to
that, the *Irish* spirits must be considered as being
allowed to be brought into the *British* market up-
on the same terms precisely as *British* spirits in
all respects, and to have the same benefit but not
a greater advantage. *Irish* spirits were therefore
for the future to be considered as *British* spirits:
ceasing to be deemed foreign spirits, and becom-
ing *British*, they might therefore come into the
British market in competition with *British* spirits,
and upon the same terms freed from the restric-
tions imposed on foreign spirits. That contract,
it was urged, must be construed in this Court, as
if it had been entered into between individuals;
and the Court must look to what was the spirit
and intention of the parties to the contract, and in
that

that view there was no pretence for saying that *Ireland* after the Act of Union, was to have an advantage over this country, by being entitled to bring their spirits here of a strength beyond that limited by Law as to *British* spirits, and not be subject to any regulation affecting *British* spirits. Such a construction would require strong and decisive words in the Act of Union, for it would affect the destruction of the trade in *British* spirits, which never could have been the intention of the Legislature. It was contended, therefore, to be quite clear that it was intended that *Irish* spirits which had paid in *Ireland* a small duty, were required to pay in *England* a further countervailing duty, making the whole amount equivalent to that paid in *England* on *English* spirits, in order to put them both in the market upon an equal footing with each other; *British* spirits having paid a duty equal to the *Irish* duty and the countervailing duty. When the *Irish* merchants have paid the countervailing duty on importation, their spirits then become *British* spirits, subject to the same duty and to every regulation to which *British* spirits are liable.

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The absurd consequence of a different construction, it was urged, would be to exclude by an oversight in the framers of the Act of Union, the *English* spirits from the *English* market; because the *English* distiller is prohibited, by the 26th Geo. III. ch. 73. sec. 34., bringing them out of a greater strength than one to eight under hydrometer proof; whilst on the contrary, the *Irish* spirits not being subject

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subject to that provision, as not being *British*, might be furnished to the dealer of a greater strength, without being subject to seizure—the Defendant's argument being, that although the *Irish* are subjected by the Act of Union, to the same duty as *British* spirits, still inasmuch as the legislature has not repeated in the Act of Union all the regulations that apply to *British* spirits, and provided that they shall apply to *Irish* spirits, *Irish* spirits are only made *British*, in respect of the calculation of the duty, and cease to be so for any other purposes.

Scotch Spirits, it was stated, had always been so dealt with since the union of that country with *England*, and it was submitted that the present question was not one of duty merely, but of commercial regulation. It was therefore insisted, that according to the true construction, the equity, good sense, intention, and spirit of the Act of Union, all the statutes regarding the manufactures and commerce of *England* are to be taken as affecting the same articles; the produce of *Ireland*, as the basis of the Act of Union, was obviously a mutuality of advantage, and a community of interests: and it was contended that judgment, in disposing judicially of this great international question, must be given for the Crown.

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ON the part of the Defendant it was urged, that upon the facts found in the special verdict, he was entitled to the judgment of the Court on the question of law, which was admitted to be one of very great

great importance, being the first that had as yet arisen upon the construction of the Act of Union, for the determination of a Court of Law.

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The question was admitted to be, as stated, whether spirits made in *Ireland*, and imported into this country subsequently to the Act of Union, and under the provisions of that act, are, when they arrive in *England*, to be subject to all the regulations which relate to *British Spirits* properly so called ; *because if they are not, they do not fall within the 26th of Geo. III. chap. 73.* and the seizure under the 34th sect. being therefore wrongful, the judgment of the Court must in that case necessarily be for the Defendant.

It was agreed that there was no distinction between the question arising upon the demurrer on the record, and upon the special verdict ; because the facts stated in the special verdict were precisely the same as those admitted by the demurrer, and in both it would depend upon the legal construction to be put on the words of the Act of Union.

The construction put on the statute by the Counsel for the Defendant, was supported in argument, first, by adverting to the words of the Act of Union : and secondly, by calling in aid, and comparing subsequent regulations in other statutes made by the legislature in *pari materia*, in order to shew from the sense in which the words in the Act of Union must necessarily have been used, with reference to the question, that the construction of the statute

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statute contended for on the part of the Defendant, was the true one, corresponding with the object and intention of the Legislature.

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With reference to the language of the Act of Union, it was contended, that as there were certain articles of the manufacture of each respective country which paid a duty in those countries; in order to equalize the advantages of trade between the two countries, and make the traffic precisely on a par in respect of the duty, each when imported into the other country should pay a countervailing duty equivalent in the whole to that paid in the producing country; otherwise, if on paying a less duty, they might import into that country which paid a higher duty they would not be upon a par—that in order to create this level of intercourse, and equality of commerce, it is in every case expressly stated by the schedule what that countervailing duty shall be. Upon the article entitled “Spirits, *British*,” therefore, it was insisted, this question would mainly depend: and that unless the Crown were right in their construction of these words the information must fall; because without those words there was nothing in the Act of Union which could be construed into an enactment that *Irish* spirits brought into *England* should be *in all respects* on the same footing, and subject to the same existing laws as *British* spirits.

It was then argued, that the words “Spirits, *British*” prefixed to this particular article in the schedule, could not be considered as a legislative enactment,

enactment, that the article contained in that schedule shall to all intents and purposes be *British* spirits, and as such be subject to all the regulations to which *British* spirits were previously liable; for that the terms “Spirits, *British*” were nothing but a mere prefix to something that is to follow, written in a larger character than the rest, as are the running heads through the whole of the schedule, and was in fact intended for nothing more than to direct the eye as it runs down the margin, to that which is the real enacting part of that schedule. The words “Spirits, *British*,” taken by themselves mean nothing—they contain no enactment; they direct nothing to be done, they declare nothing. If those words stood alone, they would be inoperative, and could not propound any regulation to prevent or legalise any traffic. The authors of acts of parliament do not legislate in this indirect and inferential way in any case, especially in respect of so important a commercial provision, as that all spirits, made in *Ireland* should become in law *British* spirits, which would be to make such a law by means of a mere prefix, consisting only of a substantive and adjective; whereas legislative enactments in such matters, are usually, as they must be to have effect, full, distinct, explicit, and positive. Thus when it became necessary for purposes of the revenue, and navigation regulations, that *Malta*, which is locally in *Africa*, should be declared to be in *Europe*, the Act did not merely speak of *Malta* in *Europe*, leaving it to be assumed to be geographically correct; but it was by a special Act of Parliament, passed for that purpose (the 41 Geo. III. chap.

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chap. 103.), expressly enacted, "That the island
" of *Malta*, and dependencies thereof, shall be
" deemed, taken, and construed to be part of *Eu-*
" *rope* for all purposes, and as to all matters and
" things whatsoever."

The words "Spirits, *British*," therefore, amounting to no more than a mere marginal note, if found at variance with that which is afterwards enacted in the body of the Act, and declared to be the intention of the Legislature, it must be rejected, and the Court can only look at the speaking part of the Act. It is not unusual that marginal notes so misrepresent the substance of an Act. As an instance of that, an Act passed in the 1st and 2nd of *Geo. III.* ch. 118. entitled "An Act for the
" more effectual administration of the Police of
" this Metropolis," was mentioned the note in the margin of that Statute, taking notice of a very considerable nuisance, blowing horns about London to announce news. It is "Preventing the blowing of
" horns on *Sundays*," on reading the enactment it is a general prohibition; and consequently, the note in the margin is inconsistent with the enacting part of the Act; and on a question of construction raised upon such a Statute, the Court would of course abide by the enactment, rejecting the marginal note, and would hold that the blowing of horns was forbidden on the week day, as well as on the Sunday.

The words "Spirits, *British*" in the schedule of this Act, are followed by a positive enactment in
these

these words, “ For every gallon, *English* wine
 “ measure, of spirits, *aqua vitæ*, or strong waters,
 “ which shall be distilled or made in *Ireland*, and
 “ imported at a strength not exceeding one to ten
 “ over hydrometer proof, 5s. 1 $\frac{1}{4}$ d.” The matter,
 therefore, which is the subject matter of this coun-
 tertailing duty is, spirits that have been distilled or
 made in *Ireland* and imported at a certain strength ;
 and that alone it is of which the Act speaks, and that
 is the article to which the countervailing duty refers:
 if that should be found at variance with the title
 prefixed, the Court must be governed by that which
 the Legislature enacts in terms, and not by the pre-
 fix, which might prove to be wrong, as if, for in-
 stance, the article “ Tobacco” had been found un-
 der the same prefix. If, therefore, the words in the
 margin of this Act are at variance with the body,
 the enacting part, the true and sound construction,
 it was insisted, must be sought for in the latter ; for
 the Court cannot give so general and efficient a
 construction to the two words “ Spirits, *British*”
 standing alone, as to say that they subject to every
 regulation which the Act contains, the article of
British made spirits. Adverting to the note under
 the same head, that “ spirits above the strength of
 “ one to ten will be charged in proportion, and on
 “ sweetened or compounded spirits, the duty will be
 “ computed upon the highest degree of strength at
 “ which such spirits can be made;” it was observed
 that an Irish distiller could not entertain a doubt
 that, after he had paid the proportionate duty, he
 would be safe in bringing the article into this king-
 dom ; Schedule (A.) being headed “ On importa-
 “ tion

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“ tion into *Great Britain* from *Ireland*,” it would be inconsistent to construe the Act as having permitted the article to be imported, but the moment it is imported, it is liable to seizure. As applied to the *British* maker of compounds there would be no objection to that, because by law, he can only make spirits of a certain strength, namely, one in eight under proof; but the *Irish* distiller being allowed to import into this country spirits of any strength, provided he pays the duty upon that strength, he cannot fairly be so charged upon his compounds: or, he would be obliged to pay a duty upon his compounds, far greater than the *English* manufacturer would upon his maximum, which is only one in eight under proof; which shews that *Irish* spirits do not, when imported, become *British* spirits, and become subject, as such, to the regulations of the 26th *Geo.* III.

It was further urged, that upon the construction of these words in the Act of Union itself, it lay upon the Crown to shew, that these are *British* spirits, and under what class in this clause of the 26th of *Geo.* III., they fall. That Statute however, so far from leaving any doubt on the question, has in Sec. 44. defined the different kinds of *British* Spirits, and expressed what shall or shall not be considered such. It says “ That all *British* spirits of the third
“ extraction, or which have been twice distilled from
“ low wines, and have had any flavour communicat-
“ ed thereto, and all liquors whatsoever, which shall
“ be mixed or mingled with any such spirits, shall
“ be deemed and taken to be *British* brandy within
“ the

“the Act, and that all such as have had no flavour
 “communicated, to be rectified *British* spirits, and
 “then that a third shall be deemed and taken to be
 “raw *British* spirits, and a fourth, *British* com-
 “pounds.” If these, therefore, become *British* spi-
 rits, merely by the force of the word *British* put in
 the margin of the Act of Union, it becomes neces-
 sary to shew to what class of *British* spirits they
 belong, whether they are *British* brandies, raw spi-
 rits, rectified spirits or what they are, and it lies
 upon the Crown to shew that, since they are di-
 vided by the Legislature into classes. If the Legis-
 lature had intended, that the *Irish* spirits should
 be *British* spirits when imported, they would not
 be so negligent as not to have ascertained at the
 same time, to what class the imported spirits should
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It was next urged, that hardships and absurdities
 must follow if a contrary construction were adopt-
 ed. By a former Act of Parliament (the 21st Geo.
 III. ch. 55. sec. 37.) it is enacted, that if any dis-
 tiller, or dealer in spirits and liquors, should buy or
 receive any *British* spirits of any person or persons
 other than a maker, distiller, rectifier, or com-
 pounder of spirituous liquors for sale, he should be
 liable to the forfeiture of 500*l*. Now if the very
 moment these spirits from *Ireland* reached the *Bri-*
tish shores, they became *British* spirits amongst
 other regulations, no man could purchase them,
 unless he purchased them from persons having the
 words “distiller, rectifier, or compounder of spi-
 “tuous liquors” painted over his door, and the con-
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sequence would be, to make it compulsory on the *Irish* trade, to send them into the hands of certain rival traders in this country. By this very Act, also, under which the seizure in question was made (sec. 34.) there are two exceptions; one is, except raw or unrectified spirits or spirits of wine, which had been received by permit, or any mixture of foreign spirits mixed with *British* spirits. Now that exception is not one that could apply to the spirits which are the subject-matter of this seizure, because when that Act was passed, no *Irish* spirits could be received by permit in the way pointed out by this Act, for *Irish* spirits were foreign spirits at the time this Act passed; and if these spirits cannot be brought within the exception, so neither can they within that part of the clause which creates the offence: and in pleading, where an offence is stated in any information, the particular exceptions must be negatived. *Irish* spirits, therefore, are not in the clause that creates the forfeiture; and for that reason the pleader, in this case, has not been content with stating that they are *British* spirits, but as he could not state of what description of spirits they are, he has eked out a description by the help of other words, from which it has been intended to infer, that they fall within the meaning of the Act.

Upon the construction of the Act of Union taken alone therefore, it was contended that these spirits could not for every purpose be taken to be *British* spirits.

They

They then adverted to the language of the Legislature in certain statutes passed shortly after the Act of Union, from which they proposed to shew that the word "*British*" could not in the prefix to the article in the Schedule have the force imputed to it on the part of the crown.

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After the Act of Union was passed, the next statute relating to the matter in question, was the 43d Geo. III. chap. 81. "An Act for granting to "his Majesty, until twelve months after the ratification of the definitive treaty of peace, certain "additional duties of Excise in *Great Britain*." In that statute, schedule A, there was an item "For "every gallon of *British* Spirits, of a strength not "exceeding that of 1 to 10 over hydrometer proof, "manufactured in *Scotland*, and brought from "thence into *England*, 2s. 5d.," which plainly shewed that the words "*British* spirits," was a term that had not escaped the attention of the Legislature at that time; but yet in the next page, there was the article "*Irish* spirits;" and those were described by precisely the very same words that had been before used in Schedule A, in the Act of Union, under the article "*British* spirits." "For every gallon of spirits, *aqua vitæ*, or strong "waters, distilled or made in *Ireland*, and im- "ported into *Great Britain* at a strength not ex- "ceeding 1 to 10 over hydrometer proof, 2s. "10½d." Admitting, therefore, for the sake of argument, that the former schedule was doubtful on account of the use of the word "*British*"—in three years afterwards, the Legislature intending to increase

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increase the duty, laid an additional sum upon what in the body of the act they call *Irish* spirits, describing them as spirits distilled or made in *Ireland*, and imported into *Great Britain*, the very same description before given of them in the schedule to the Act of Union under the prefix "*Spirits, British*". That, it was urged, was a legislative exposition, which made it necessary to consider that the word *British* had crept into the former act accidentally, or that the only construction to be put upon the former act was, according to the enacting part, that these spirits were *Irish*, and not *British*. The schedule in the 43d of *Geo. III.* also goes further, and states in substance that note found in the Act of Union. "For and upon
"all such spirits last above mentioned, above the
"strength of 1 to 10 over hydrometer proof, a duty
"in proportion to the last mentioned duty, and for
"and upon all such of the said spirits as shall be
"sweetened or compounded, a like duty computed
"upon the highest degree of strength at which
"such spirits can be made." So far, therefore, from there being no such term as "*Irish* spirits" known to the Legislature, they use the term "*Irish* spirits," as a *distinct* head and they apply to it the very same denomination of spirits, thereby furnishing an argument from the mouth of the Legislature itself, to shew that when they used the term "*British* spirits" before, they meant nothing more than is stated in this Act. If, in the Act of Union, the words had been "*Spirits, Irish*," no objection could have existed, and that is the only ground upon which the Crown can expect to succeed. So

in

in the same schedule, in furtherance of that exposition a duty is fixed. "For every gallon of "brandy, spirits, &c. imported into *Great Britain*, not being *Irish spirits*." In the same manner, in the 54 Geo. III. chap. 149. sec. 13, 14. *Irish* and *British* spirits are distinguished, and in sec. 15.—which allows to rectifiers 150 gallons of *British* brandy rectified *British* spirits or compounds for every 100 gallons of such *Irish* spirits, which they shall have respectively received—the two terms are put in contradistinction to each other, shewing, that the Legislature certainly contemplated that there might be one sort of spirits of a class called *British*, and another of a class called *Irish*.

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Adverting also to the 4th section of the 54th Geo. III. cap. 149. which was passed to regulate until the end of the next Session of Parliament, the trade in spirits between *Great Britain* and *Ireland*, reciprocally—it is thereby enacted, "that if "any spirits made in *Ireland*, shall be imported "or brought into *Great Britain* at a strength exceeding that of one to four over hydrometer "proof, they shall be forfeited:" it was urged that there was no occasion for that legislation, if the construction of the Crown were right; because if *Irish* spirits when imported into this country became *English* spirits, they would be forfeited, long before this Act, for no *English* spirits could be brought to the *British* market of so great a strength: but this Act fixing the maximum for the first time as to *Irish* spirits, provided, that if *Irish* spirits were

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brought here of a greater strength than from one to four over proof, they shall be forfeitable. From that they inferred, the Legislature could not have considered that they were already *British* spirits, for if they were, they were subject to forfeiture long before the passing of that Act. In section 9, it is further enacted, "that the proprietor or proprietors, " importer or importers, consignee or consignees of " any spirits made or manufactured in *Great Bri-* " *tain*, and imported from thence into *Ireland*, or " made and manufactured in *Ireland*, and imported " from thence into *Great Britain*, shall do certain " acts and conform to certain regulations." It was thereupon observed, that it had been stated in the course of the argument for the Crown, that these being *British* spirits, must be subject to all the regulations of *British* spirits, one of which is, that *British* spirits cannot be sent into the hands of any one of a certain strength mentioned, unless he be a rectifier, and they are sent to him for the reduction of them; but it was remarked, that there is not a word as to sending the spirits mentioned here into the hands of the rectifier—the words being, that the proprietor or proprietors, importer or importers, consignee or consignees, of any spirits made or manufactured in *Great Britain*, and imported from thence into *Ireland*, or made and manufactured in *Ireland* and imported from thence, &c. It appears, therefore, that the Legislature were aware that spirits might be imported from *Ireland* into the hands of the consignees or importers; whereas the Crown's construction must be, that as the moment they reach the shores of *England*,

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England, they are *British* spirits, if imported here, they must go directly into the hands of the rectifier, or the importer must reduce them himself. By the 54th of the King, however, the Legislature recognizes that spirits might be imported from *Ireland* into the hands of the importer, or into the hands of the consignee: and if that was their intention, it shews that such spirits were not necessarily to be carried to the rectifier, and if not, the 26th of the King does not apply to them. That, therefore, was urged as an additional ground for shewing that the construction contended for by the Defendant, was the correct one.

It was remarked that this was not a new question entirely; for though it had never been brought directly in discussion before the Court, whether the former Acts made before the passing of the Union, do, or do not, apply to *Irish* spirits imported; yet in a case of the *Attorney-General v. Vincent*, it was said to have come collaterally before *Lord Chief Baron Macdonald* on the 4th July 1804. That was stated to be a case wherein the then Attorney-General maintained that the question was a question of fact as to the quality of a certain quantity of *Irish* spirits seized, it being, whether they were compounded spirits, or raw spirits uncompounded, and that was submitted to the Jury; but when the *Lord Chief Baron* summed up, a doubt arose in his mind, whether these former Acts of Parliament applied to the subject matter in dispute or not: if they did not, the investigation whether they belonged to one class or the other was beside

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the question. The *Chief Baron* there said " I conceive that this Act of the 26th of the King, which is handed up to me, can have nothing to do with the subject, for it refers to *British* spirits."

The 1 *Geo.* IV. chap. 77. imposes excise countervailing duties " for and upon every gallon, *English* wine measure, of *Irish* spirits, which shall be imported or brought from *Ireland* into *England* not exceeding certain degrees of strength, and so in proportion for any greater degree of strength, following the same enactment in terms as that which was originally contained in the Act of Union. By the 93d sect. of the 46th *Geo.* III. chap. 88. sec. 93. entitled " an Act to provide for the regulating and securing the collection of the duties " on spirits distilled in *Ireland*, and the warehousing of such spirits for exportation ;" it is provided that no spirits of a strength less than a strength equal to one to ten over hydrometer proof, by *Clarke's* hydrometer, or by such other hydrometer as shall be approved of by the Commissioners for executing the office of Lord High Treasurer of *Ireland* shall be so warehoused. That was a provision, the terms of which, shewed exportation to *England* was in the view of the Legislature: and by sect. 101. it is further provided, " that all such spirits shall be shipped only in such vessels as by law spirits of *Irish* manufacture may be shipped in for exportation, subject to all regulations, forfeitures, and penalties, in respect of relanding or unshipping the same, as are, or may be contained in any Act or Acts respecting spirits shipped from *Ireland*

Ireland for exportation to *Great Britain* or elsewhere." By another clause (107) the Act provides certain regulations for the drawback to be allowed on exportation of *Irish* spirits to *Great Britain*. Section 108 has these words, "whenever such spirits which shall not have been warehoused under this Act, shall be entered for exportation to *Great Britain*"—it then makes certain provisions. *Irish* spirits may clearly be imported into *Great Britain* of a strength of not less than one to ten: but if the argument used for the Crown, is correct, that such spirits are to be considered as *British* spirits to all intents and purposes, they cannot be sent out to the public at all, as no person can send them out of a greater degree of strength than one to eight under proof, the minimum at which the *Irish* distiller may import it, but when it gets here, it may be seized. It is therefore plain, from all these statutes, that spirits made in *Ireland* imported since the Union, are not under the same terms as *British* spirits so called. In the 49th *Geo. III.* also,—chap. 8. (which was an Act to suspend the importation of *British* or *Irish* made spirits into *Great Britain* or *Ireland* respectively, till the intercourse between the countries should be regulated) reciting, that doubts had arisen whether the regulations made as to the drawbacks and countervailing duties did not operate in favor of one country to the prejudice of the other, contrary to the Act of Union, for which reason the spirit trade to each country is suspended,—*British* made spirits and *Irish* made spirits are brought into opposition to each other. That affords another Legislative exposition, that *Irish* spirits cannot be considered

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sidered to mean *British* spirits in the proper meaning of the term.

By the 55th *Geo. III.* cap. 83. sec. 3. it is enacted (referring to the Act of Union) that the importers of *Irish* spirits into *Great Britain*, shall be allowed a drawback of the whole duty on exportation: The *English* distiller must make and warehouse his spirits for exportation, without paying any duty, in a different place from that in which he makes them for home consumption. If spirits should be imported from *Ireland* to *England* to be exported, the duty then paid upon importation ought to be returned to the *Irish* distiller, otherwise the *English* and *Irish* distiller would not be on a trading par; but if the construction of the Crown be right, that these spirits so imported, become *British* spirits, there is no regulation in this Act which would enable him to get any drawback at all; for *British* spirits have no drawback allowed on exportation, having been made without paying any duty. There is however no provision in this Act enabling the *Irish* distiller to go to the Excise and demand the duty he had paid, for if the Court should hold that *Irish* spirits form a class of themselves—that though they did not formerly, when they came into *England*, become *British* spirits; yet, that they are now a class of *British* spirits, introduced by the Act of the Union; whether they are called *British Irish* spirits, or spirits made in *Ireland*, and imported into *Great Britain*, by neither of those descriptions could the drawback be obtained.

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It was in conclusion urged, that this statute was not so much to be considered in the light of an Act of Parliament, as in the light of a great international treaty: and it was urged that the ground of construction, which has always been had recourse to when treaties have been to be interpreted is, that it should be as liberal as possible, that they should not bring persons under forfeiture, where it was not necessarily to be inferred from the language of the treaty itself. At the time this Act passed, it was an Act that was rather sought for by this country than by *Ireland*: it formed a great part of the boon held out to *Ireland*, in the advantage to be derived to the different manufactures of *Ireland*, and above all others the advantage it would be to the agriculture of that country. And if the *Irish* have either by greater skill or experience, the power to extract a stronger spirit than the *English* distiller, it cannot be presumed to have been the intention of the Legislature, that any superiority in skill which the *Irish* manufacturers possess, should be crushed, by denying them the advantage of it in this country; for it would be a strange thing to say to the *Irish*, we will deal with you on equal terms, you shall pay a countervailing duty proportionate to the quality of the article you can make—which plainly allows, that if they can make a stronger spirit than we can, they may do so—on paying a duty upon it in proportion; and then to make it a law that *Irish* spirits brought here should be forfeited, because the *British* merchant by our private regulations, or from want of knowledge of the art, is not able to make it so strong. That would not be a liberal, nor the sound construction of such an Act. In every

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every case in which matters of this kind have come under discussion, in any Treaty, in any Act between Nations, the invariable rule of construction is, that the presumption shall be against the stronger party, if there is doubt; because that party has the power to impose his own terms. Taking it then to be mere matter of construction—*Vattel's* Law of Nations was referred to (B. II. chapter 17. "Of the interpretation of Treaties," Sect. 264.) where—speaking of the doubts that are afterwards raised, upon the precise meaning of the terms used in treaties,—it is said "The following Rule will at once cut short all chicanery—*If he who could and ought to have explained himself clearly and fully, has not done it, it is the worse for him, for he cannot be allowed to introduce subsequent restrictions, which he has not expressed.* This is a maxim of Roman Law, *Pactionem obscuram iis noscere in quorum fuit potestate Legem apertius conscribere.*" At the time the Act passed, it was urged that it was in the power of *England* to explain fully what she meant. If, therefore, the Legislature had meant to express, that *Irish* Spirits when brought into this country, should be treated as *British* Spirits, they might have so expressed it, they had at that time the power to do it—and they have not done it. *Si voluit non dixit.*

In this case it was submitted that the words are sufficient to raise a doubt, and if they were, the doubt should be resolved against, and not in favor of the stronger party, who are now endeavouring to bring it to bear against the weaker.

It

It was on the whole contended, that *Irish* made spirits, when imported, are not subjected thereby to *all* the previous regulations in respect of *British* spirits, and consequently the Act of the 26 of Geo. III. does not apply to them; and therefore the judgment of the Court on this Information, ought to be in favor of the Defendant upon the record.

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IN reply—the substance of the general argument for the Crown was repeated and enforced, and the positions urged on the part of the Defendant represented as an attempt to obtain an undue advantage.

Reply.

It was then insisted, that the words “*British* spirits” were not, as had been contended, a mere marginal note, but were so denominated, with reference to the provisions of the statute, as one of the consequences of the Act. They were, therefore, part of the Act itself, and the Court could not reject them, forming as they did, the most material part of the enactment, and as such, they supported the construction on which these words were founded, that *Irish* spirits, when brought into the *English* market, were to be considered to *all* intents and purposes *British* spirits, entitled to the same privileges, and to be no longer subject to the restrictions to which they were before subject, but subject, certainly, to the same regulations as *British* Spirits, otherwise there would be no mutuality, no reciprocity; and so far from being put upon an equality, the *Irish* would be on a superior footing, and would have such superior advantages

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advantages in the *British* trade, as would drive the *British* commodity out of the market.

Reply. In answer to the arguments founded on subsequent Acts, in which it was said that the Legislature had not uniformly adhered to the term *British* spirits, because those called *British* spirits in the Act of Union, are called *Irish* spirits in other Acts, and more particularly, in the Act of the 54th of the late King; it was insisted, that this Statute, the Act of Union, was to be construed per se, and being sufficiently clear and explicit, did not require the aid of other statutes in order to its construction, and that if it did, they would be found to support the construction put on it by the Crown, rather than that of the Defendant; and it was further observed, that the former had been the only construction hitherto always put on it, by the conduct of the *Irish* traders, the parties to the Act.

On that point it was urged, that it could not be expected, that in a great national contract of this sort, where the two countries were stipulating for great objects, all the particular regulations which might be adapted to the views of the two countries thus united, should be embodied in one Act. It must necessarily be left to future occasions, to make suitable provisions to supply discovered deficiencies by new statutes. For instance, this difficulty was soon found to occur, of which no advantage had been taken. By the *English* Law, spirits must pass immediately from the hands of the distiller into the hands of the rectifier—when the spirits are distilled

distilled in *Ireland*, they come over here to the importer—he is not a distiller himself, and therefore there might be a question, whether, as they pass through his hands, they might not be liable to seizure; that is one of the difficulties arising from considering such as *British* spirits, which was obviated by the 54th of the late King, removing a technical difficulty, which could not be expected to have been provided for in detail, although it was in substance. Another difficulty was, that spirits must be reduced to the proper strength, before they could get into the hands of the dealer by the rectifier; it might be said, that the laws allowed that to be done in certain cases only, which were not applicable to *Irish* spirits, till the year 1814, so that it became necessary to have that difficulty also removed.

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By considering them to be *British* spirits within the meaning of the Act of Union, and subject to *British* regulations, that difficulty was virtually obviated. On the occasion of passing the 54 Geo. III. no Member of either House of Parliament objected, that as *Irish* spirits, they were not *British* spirits, and that therefore there existed an advantage over *England* in favor of *Ireland* under the Act of Union, in not being subject to such regulations as affected the *British*, on the ground of its being such innovation as would equalize them, and thereby a breach of that contract. With unusual care, *British* spirits, and spirits made in *Ireland*, exported into *Great Britain*, are treated, in the language of all the statutes, as convertible terms; the 54th of
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George III., called the Spirits Intercourse Act, passed to regulate the trade between the two countries, to introduce regulations, and remove difficulties, that had existed in the minds of persons upon the subject, enacts (sec. 14.) “ That the proprietor or proprietors, importer or importers, consignee or consignees of any spirits made or manufactured in *Ireland*, and imported from thence into *Great Britain*, under or by virtue of this Act, shall immediately on the landing thereof, carry and convey the same, or cause the same to be carried or conveyed to and put into such warehouse or warehouses for that purpose provided (at the charge of such proprietor or proprietors, importer or importers, consignee or consignees), as shall be approved of by the Commissioners of Excise, or any three or more of them, in *England* or *Scotland* respectively as the case may require, and such proprietor or proprietors, importer or importers, consignee or consignees, shall, before he, she or they shall remove, or be entitled to any permit for the removal of, any such spirits from or out of such warehouse, give to the proper officer of Excise, notice in writing, to attend at such warehouse or warehouses, between the hours of seven in the morning, and four in the afternoon, for the purpose of seeing such spirits reduced as thereafter mentioned. And such proprietor, &c. shall, immediately on such officer’s attendance, or within half an hour then next following, reduce, in the presence of such officer, all such spirits intended to be removed, to the strength of one to ten over hydrometer proof, and if such proprietor, &c. shall neglect or refuse to give such notice,

or

or to reduce such spirits in manner aforesaid, all such spirits shall be forfeited." Now one to ten over hydrometer proof is the strength at which *British* spirits are to be distilled ; the rectifier may add fifty per cent. to what he receives from the distiller, because he is entitled to, and send out one hundred and fifty gallons of one to eight under hydrometer proof, for every one hundred gallons received. In the next section (the 15th) It is further enacted, that "there shall be allowed to the rectifiers and compounders of spirits in that part of *Great Britain* called *England*, permits, for the sending out any number of gallons, not exceeding the rate or proportion of one hundred and fifty gallons of *British* brandy, rectified *British* spirits or compounds, for every one hundred gallons of such *Irish* spirits which they respectively shall have received, of the strength of one to ten over hydrometer proof." There they are called "*Irish* spirits," merely because they are made in that part of the United Kingdom called *Ireland*, and for distinction, as the produce of this country is termed *Worcester* or *Staffordshire* China, and *Herefordshire* or *Devonshire* cyder: so spirits made in *Ireland*, are called *Irish* spirits ; but they are *British* spirits, when imported into *England*, for all purposes of regulation and of duty, and subject to be dealt with exactly as *British* spirits are, and are treated, even where they are termed *Irish*, as being *British* in all acts of legislation regarding *British* spirits. Thus they are here required to be reduced to the strength of *British* spirits, and the *British* rectifier is allowed permits accordingly. But the

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the 43d of *Geo. III.* ch. 69. "Sched. B.—Duties," it was contended, removed all doubts which had been endeavoured to be cast on the question, by the attempt to shew, that the Legislature had itself furnished an exposition of its meaning, inconsistent with such a construction of the Act of Union in that respect as it would be necessary to establish as the true one, in order to support the present information. Under the head (in Sched. B.—Duties.) "SPIRITS BRITISH" there are precisely the same articles described, in the same words as in the item in question in the Act of Union, and in substance the same note, and that at once proves most clearly, that by whatever denomination *Irish* spirits may be here or there termed, in two or three statutes, they are, when in *England*, *British* spirits, and are technically so called, where it is necessary to give them an exciseable name.

As to the argument, that if *Irish* spirits become *British* spirits when imported here, they would not have any drawback upon exportation—it was answered, that as *British* spirits, the Act of Union itself had provided for that, enacting, "that upon the export of the said articles from each country to the other, respectively, a drawback shall be given equal in amount to the countervailing duty, payable on such articles on the import thereof in the same country from the other; and that in like manner in future, it shall be competent to the United Parliament to impose any new or additional countervailing duties, or to take off, or diminish such existing countervailing duties as may appear on

on like principles to be just and reasonable, in respect of any future, or additional, or internal duty; the same article says, "That all articles, the growth, produce, or manufacture of either country when exported through the other, shall in all cases be exported, subject to the same charges as if they had been exported directly from the country of which they were the growth, produce, or manufacture." They are, therefore, by the Act of Union, with respect both to the export and the internal trade, placed on the same footing as *British* spirits, and entitled to the same privileges. They are in effect by the Act of Union, made *British* spirits on importation into *Britain*. It was urged, therefore, that the argument, that but for the 54th of *Geo. III.* spirits made in *Ireland* would not have been subject to any of the regulations affecting *British* spirits, proceeds wholly on a fallacy, because, that Act was passed not to impose any burthen on them, or to subject them to any particular regulation, but merely to relieve the *Irish* distillers from the difficulties which it was considered that they laboured under, arising from the doubts which had existed as to the beneficial operation in their favour, in some respects, of the Act of Union.

Spirits made in *Ireland* and imported into this country, it was contended, must be either foreign or *British*, no other description of spirits being recognised by law in this kingdom. If they are foreign spirits, it was urged, they would be subject to a much higher duty on importation: if they

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they are not, they must be *British*—otherwise, it must be argued, that they are neither *British* nor foreign, but, that they are something, *sui generis*, called *Irish* spirits, not subject to the restrictions to which they were subject before the Act of Union as foreign spirits, and entitled, not only to all the privileges of *British* spirits to the full extent, but also to privileges which belong to neither *British* nor foreign spirits, that of being brought into the *British* market of a greater strength than is allowed to *British* or foreign spirits.

Adverting in conclusion, by way of recapitulation, to the obvious nature and necessary meaning of what (it was contended) ought to be regarded and construed liberally, as being rather a great international contract, than a legislative act; and as a compact made between the two countries as parties, rather than a mere statute passed by the United Parliament—to the manifest object and intention of both countries, treating together on a broad basis of complete union of interests, where consequences productive of minor inconvenience to either should be disregarded as being remediable in detail in another manner; it was insisted, that even if the language of the statute had been still less clear, as long as it was sufficiently explicit, regard being had to the intention of the Legislature to enable the Court to put a fair construction upon it, they might so construe it in determining particular questions arising on it by the aid of the general tenor of the Act, and the declared objects of the Legislature. Here, however, that aid

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was not required, as the words in the schedule had put an express and conclusive construction on the language of the body of the Act. It was therefore submitted, that judgment ought to be given for the Crown.

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Cur. adv. vult.

The *Lord Chief Baron* now delivered the judgment of the Court.

The case of the *Attorney General v. Mackenzie*, stands for the opinion of the Court this day. The question came on before us upon a special verdict, which states shortly, that the spirits in question were distilled and made in *Ireland*, that upon their being imported into *England* from *Ireland*, the proper duties were paid; that they were seized, being found in the custody of the Defendant in *England*, he being a dealer in spirits, and not being a rectifier or compounder of *British* spirits; and [this is the material part of the case], that the spirits were at the time of the seizure, in quality and strength exceeding one to ten over hydrometer proof. It was found that the time at which this seizure was made, was after the Act of Union with *Ireland*; that the spirits were not protected by the exceptions which are mentioned in the statute of 26 Geo. III. chap. 73. sec. 34. by virtue of which the seizure was made. That section provides and enacts "That if any *British* spirits, except the spirits excepted (within which the spirits in question do not fall), shall be found in the custody of any dealer or dealers in spirits, not being a rectifier or compounder of *British* spirits, exceeding the

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strength of one in eight under hydrometer proof, they shall be forfeited." It is clear, and it seems admitted by the Defendant's counsel, that if the spirits were *British* spirits, the seizure was lawful. The question then is, whether the spirits in dispute, are not, according to the law as established at the time of the Union between *England* and *Ireland*, to be considered and dealt with in all respects as *British* spirits, though in fact made in *Ireland* ?

Before the Union between *England* and *Ireland* spirits made in *Ireland*, and imported into *England*, were held to be, and were treated as foreign spirits, and accordingly paid a higher duty than spirits made in *Britain*, and that duty was assessed also in a different manner. Then the Act of Union passed the 39th and 40th *Geo. III.* chap. 67. ; and the 6th Article of that Act is the only part of the statute to be considered as applying to the subject before us. Referring to the mode of drawing up that Act of Parliament, the Articles were part of the act beyond all question. There is no material difference in point of form between the Act of Union between *Great Britain* and *Ireland*, and the Act of Union between *Great Britain* and *Scotland*. The sixth article is this,—“That his Majesty's subjects of *Great Britain* and *Ireland* shall, after a given time (1 *Jan.* 1801), be entitled to the same privileges, and be on the same footing as to encouragements and bounties on the like articles, being the growth, produce, or manufacture of either country respectively, or generally in respect of trade and navigation in all ports and places
 in

in the United Kingdom and its dependencies, and that in all treaties made by his Majesty, his heirs and successors with any foreign Power, his Majesty's subjects of *Ireland* shall have the same privileges, and be on the same footing as his Majesty's subjects in *Great Britain*," that is to say, the subjects in both countries shall be entitled to the same privileges, and be, in all respects, on the same footing, "as to encouragements and bounties on the like articles, being the growth, produce, or manufacture of either country respectively and generally, in respect of trade and navigation in all ports and places in the United Kingdom and its dependencies."

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The *Attorney General* stated the excise regulations, as prescribed by the different statutes with respect to spirits in *England* and in *Ireland* before the Union in so perspicuous a manner, that I shall not attempt to repeat that statement of those regulations, nor need I advert to them particularly here; but I would refer the Court to those observations, which are still fresh in the memory of every one of us. The sixth article states the agreement and contract of the two countries, and is the corner stone on which the arguments on both sides must be founded. That article goes on to declare, that, from a given day, "all prohibitions and bounties on the export of articles, the growth, produce, or manufacture of either country, to the other shall cease and determine, and that the said articles shall thenceforth be exported from one country to the other without duty or bounty on

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such export," still proceeding on a principle of equality of advantage as between the two countries, considering them as intended to be put upon an equal footing. Then it proceeds thus: "all articles the growth, produce, or manufacture of either country (not hereinafter enumerated as subject to specific duties), shall from thenceforth be imported into each country from the other, free from duty, other than such countervailing duties on the several articles enumerated in the schedule No. One A and B, hereunto annexed, as are therein specified, or to such other countervailing duties as shall hereafter be imposed by the parliament of the United Kingdom in the manner hereinafter provided." The countervailing duties are certainly, by this article, considered as specified distinctly and sufficiently in the schedule No. One A and B; but the Legislature, at the same time, foreseeing that other countervailing duties might hereafter be more convenient to the two countries, it is left to Parliament at a future time to make such alterations as circumstances should be found to require. It is therefore provided that "for the period of twenty years from the Union, the articles enumerated in the schedule No. 2, hereunto annexed, shall be subject on importation into each country from the other, to the duties specified in the said schedule No. 2."

Having read so much of the sixth Article as seems to me to be necessary upon the present occasion, I turn now to schedule No. One A. and B. Schedule No. One is entitled thus, "Of the Articles

cles to be charged with countervailing duties upon importation from *Ireland* into *Great Britain*, and from *Great Britain* into *Ireland*, respectively, according to the sixth Article of Union." Letter A. is "On importation into *Great Britain* from *Ireland*." Beer, Bricks, and Tiles, Candles, and a great number of other articles are here enumerated alphabetically, to which the countervailing duties are applied, and we come at last to spirits. It is headed, "SPIRITS, *British*." The item is, "For every gallon, *English* wine measure, of spirits, *aqua vitæ*, or strong waters, which shall be distilled or made in *Ireland*, and imported at a strength not exceeding one to ten over hydrometer proof." The title of the item is material. It is "Spirits, *British*," and in describing "Spirits, *British*" are enumerated; spirits, *aqua vitæ*, or strong waters, which shall be distilled or made in *Ireland*, and imported into *England* at a strength not exceeding one to ten over hydrometer proof." I find it extremely difficult to say, that when the Legislature inserted this in the schedule, they could have meant any thing upon earth, but that the spirits which were made in *Ireland* and brought into *England*, were to be considered to be such spirits as the Act calls them, that is, *British* spirits. What can these words mean, unless, that spirits which are made in *Ireland* and brought here, should be considered here as *British* spirits, just as much so for the purposes of this and other Acts of Parliament, as if they had been made in *Great Britain*? Then there follows this note: "Note—spirits above the strength of one to ten, will be charged in proportion;

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portion; and on sweetened or compounded spirits, the duty will be computed upon the highest degree of strength at which such spirits can be made:" still applying this note to the very same thing, the Article when made in *Ireland*, and imported into *Great Britain*.

Then schedule B. is "On importation into *Ireland*, from *Great Britain*." The word spirits is found there also at the head of the Article, thus, SPIRITS.—For and upon every gallon of spirits }
being of the manufacture of *Great Britain*, } ^{s. d.}
and imported from thence a duty of - - - } ₃₋₇
so that in the one case they distinguish the spirits coming from *Ireland* to this country, as *British* spirits. In the other schedule B. they do not call them *British* or *Irish* spirits, but spirits generally; spirits made in *England* and sent over to *Ireland*. Those are called spirits generally without any further description being added to them.

With respect to myself, I confess, that on a view of the body of the sixth Article, independently of any elucidation furnished by the schedule, it seems to me, to be quite clear, that a reciprocity of benefit and a consolidation of their respective commercial interests, were unquestionably the object of both countries when they entered into the treaty on which this Statute of Union was founded. They were to be made, in all respects, as to trade, as one Country. In reference to this particular subject, *Irish* spirits, if any such should be imported into *Great Britain*, were meant to be entitled

titled to all the protection and indulgence to which spirits made here would be entitled, and to be no longer considered as foreign spirits in any respect, or for any purpose. Their character of foreign spirits was entirely extinguished by the provisions of the sixth Article. Then, surely, if they are to have the advantage which this Defendant now claims, it would be, on the part of the *Irish* trade, an evident breach of the contract which is provided by the sixth Article: because, it is quite clear, that if the Defendant be right in his argument, the one country would be entitled to greater advantages than the other, and the intended object of that Article, the establishment of a reciprocity and consolidation of commercial interests, would be entirely defeated. I confess, therefore, that if the insertion of the word *British* had not been made in the schedule, and the question had arisen fairly without reference to the schedule, I should have drawn the same conclusion from the Article itself: and I must have decided against the Defendant on the language; the principle, and the spirit of the body of the sixth Article, even if the word *British* had not been inserted in schedule A. That seems to me to be the necessary consequences of our consideration of the sixth Article, as comprising the terms of a contract between the two countries, which was meant to create a complete reciprocity of interests between both—giving to the *Irish* spirits on the one hand, all the advantage on importation into *England*, which the *British* material had before; and on the other, giving to the *British* spirits all the advantage which could have

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have belonged to *Irish* spirits when brought into this country. Now as that would have been my opinion most probably upon the spirit and language of the Article itself, without reference to the Article schedule A., of course, the insertion of this word "*British*" there makes it, if possible, still more clear; interpreting, beyond a possibility of doubt, the meaning and view of the parties. We cannot suppose that the words, "*Spirits British*," had not or were not intended to have any meaning. They form part of the statute: and if they have any, what meaning can they have, but that which we assign to them? With reference to the body of the sixth Article particularly, and the terms also that follow the very words themselves in the schedule, what meaning can they have but such as should operate as a declaration, that the spirits mentioned in the item shall become *British* spirits as soon as they have been imported into that part of the United Kingdom, called *Great Britain* from the other part of the United Kingdom called *Ireland*? This is the construction which I feel myself called upon to put upon this Act of Parliament, the Act of Union, upon the construction of which the whole case, certainly, entirely depends.

But it is urged, and very fairly, that if the Legislature (the authors of the Act of Union) have shewn by the language employed in former or subsequent statutes, that a different construction is the just one, the Court, whatever its opinion might otherwise have been on the language of this Act of Union, must necessarily bow to the intention of the

the Legislature, as manifested by other Acts passed in respect of other parts of the same Law. For that purpose and with that view, the language of the act of the 43d Geo. III. cap. 81. schedule A. has been much insisted on. There, certainly, under the head "*Irish spirits*" we find enumerated "*Spirits &c. made in Ireland, and imported into Great Britain :*" but that Act merely imposes an additional duty on such spirits, and does not in any degree affect the sixth Article of the Union, which is left quite uncontrolled by any of its provisions : this Act in fact applies to spirits made in *Ireland*, and also in *Great Britain*, respectively. But as an answer to that, the statute of 43 Geo. III. cap. 69. schedule B. was adverted to by the Attorney-General in his reply; the heading there, is "*Spirits, British,*" and then the item described is this, "for every gallon *English* wine measure of spirits, &c. which shall be distilled or made in *Ireland*, and imported into *Great Britain* at a strength not exceeding one to ten over hydrometer proof." That Act as clearly declares in effect the same thing which had been declared, according to my notion of it, in the Act of Union itself: namely, that those spirits which were made in *Ireland*, and had been imported into *Great Britain*, were *British* spirits, and to be so considered for all purposes. Surely this is strong evidence to shew, as matter of construction, that the Legislature intended that spirits though made in *Ireland*, should, when imported into *Great Britain*, be considered as *British* spirits.

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The terms of the Act of the 54th *Geo.* III. cap. 149. has also been much pressed on us by the Counsel for the Defendant, as containing language and provisions, the construction of which was urged to be wholly inconsistent with the construction of the Act of Union now contended for on the part of the Crown. I have looked through the statute, and indeed all the Acts with the greatest care I could: but I cannot understand that Act of the 54th *Geo.* III. in the manner in which it is proposed to be construed by the Counsel for the Defendant, as necessarily furnishing any such exposition of the Act of Union. The regulations in that Act of Parliament are perfectly consistent, as I conceive, with the construction which we are disposed to put upon the Act of Union. The term *Irish* spirits is used there, it is true, very frequently, but that only imports distinction; for the word is merely used for the purpose of brevity and clearness, to refer to the spirits made in *Ireland* as contradistinguished from those made in *England* and *Scotland*: and that in my opinion does not govern the construction to be put on the terms in other Acts. It would be quite tedious to go through the particulars of these Acts of Parliament, they were stated very much at length in the course of the argument, and it is sufficient to say, that it appears to me that the introduction of the word *Irish* spirits, as used in any of them, does not at all affect this case. The 49th *Geo.* III. cap. 8. has also been mentioned, but that statute does not at all apply to this case.

Thus

Thus stands the case with reference to the construction supposed to be applied by Parliament by statutes subsequent to the Act of Union : and it seems to me, the observations which arise upon that part of the argument, confirm the construction which I have said we think ought to be put upon the Act of Union. The case must therefore be determined on principle with reference to the objects of the contract. One of the great objects of the Act of Union between this country and *Ireland*, was to place the two countries on equal terms with respect to the advantages to be derived to each from their respective manufactures and trades. That is expressed with sufficient clearness. That object will be disappointed, if the construction of the Act of Union insisted upon by the Defendant were to prevail, for in that case *Ireland* would receive a valuable advantage over *Great Britain* : and that consideration must guide us in deciding this case. In determining this question, it is necessary that we should recollect that the spirits in dispute, though made in *Ireland*, must be imported into *England* before they become subject to be dealt with as *British* spirits. I admit, however, that whatever the real construction may have been, if the statute has not sufficiently expressed its purpose on the particular subject before us, we cannot insert words : but, I am clearly of opinion, that if we consider the body of the sixth Article alone, and more especially, when explained by the language of schedule A. the statute is sufficiently expressive and explicit. I likewise think, that the subsequent Acts do not, in the least degree, affect

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affect this construction : and that, in point of fact, some of the subsequent Acts very directly confirm it, without referring to schedule B. attached to the 43rd Geo. III. cap. 69., which must be allowed to be no slight confirmation of the opinion I have expressed ; where the schedule has the very same term “ Spirits, *British*,” and it must certainly be considered as a very strong confirmation of the construction we put upon that Article. I therefore think the verdict ought to be entered for the Crown. That will be, I believe, conformable to the practice which has uniformly prevailed from the Union to the time of the present contest in the affairs of the revenue of the Excise. I place no reliance, however, upon that circumstance in forming the opinion which I entertain, and have expressed : but I mention it, merely as it shews what has been the opinion of those who have been practically conversant with the subject during all that period. I believe my learned Brothers concur with me in the opinion I have expressed.

GRAHAM and WOOD, *Barons*, without giving any reasons, expressed their concurrence in the same opinion.

The Court, therefore, gave

Judgment for the Crown.

* * * Against this decision there is now a writ of error pending in the *Exchequer Chamber* : and the question is expected to be argued in the course of next Term.

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Wednesday,
26th June.

Tuesday,
25th June.

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PARKE moved for a rule to shew cause why the order which had been obtained by *Jeremy* for a *concilium* on the demurrer in this case, should not be set aside for irregularity with costs, upon an affidavit stating, that a demurrer was delivered to the Defendant's replication on the 18th instant—and that on the 20th, the demurrer book was delivered, but no rule had been given to bring in the demurrer book, notwithstanding which, the Plaintiff on the 21st of *June* moved for and obtained a rule for a *concilium* for the last day of this term.

Order for a *concilium* granted on the 21st of *June*, for arguing on the 26th (the last day of term) a demurrer delivered by Defendant to the Plaintiff's replication on the 18th *June*, the demurrer book being delivered on the 20th, but no rule given to bring in the demurrer book : the Court refused to set aside the order, where it appeared that the demurrer was filed for delay, the Plaintiff having tendered an issue to the country on the Defendant's pleas, although four days had not been given to the Defendant to return the demurrer.

The action was, Debt on a Judgment recovered, in the usual form, for a sum certain for the debt, and a further sum for the damages sustained by Plaintiff by the detention of the debt and costs, &c. The Defendant pleaded first, that after the recovery of the said judgment, and before the exhibiting of the Plaintiff's bill, to wit, on the 1st of *June*, Defendant paid to the Plaintiff *the said sum of money* in form aforesaid recovered; and secondly, that after the recovery of the said judgment, to wit, on the 1st of *January* 1822, the Plaintiff caused to be sued and prosecuted out of the *Exchequer* a writ of *capias ad satisfaciendum* against the Defendant, directed to the Sheriff of *Middlesex*, &c. &c. under and *by virtue of which* said writ, certain persons then being Sheriff of the said county, having had the said writ delivered

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livered to them, afterwards, to wit, on the day and year last aforesaid, took and arrested the Defendant and had him in custody or execution for the debt and damages aforesaid, concluding with a verification.

The Plaintiff replied, tendering issue on the first plea, averring that the Defendant did not pay to the Plaintiff *the said debt and damages* in form aforesaid, and recovered in manner and form aforesaid, as the Defendant had above in that behalf in his said plea alleged : and as to the second plea, (protesting that no such writ issued as in the said plea, &c. ; and also, that the Plaintiff did not sue or prosecute out of the *Exchequer* any such writ directed to the Sheriff of *Middlesex*, as, &c. : and also, that no such writ was ever delivered to the said Sheriff)—that the said Sheriff did not, *under, and BY VIRTUE of any such writ* of our said Lord the King, take and arrest the said *George* and have him in custody in execution for the said debt and damages in manner and form, &c.—concluding to the country.

The Defendant demurred to those replications, for that the first replication did not traverse or confess and avoid the matters alleged in the said first plea, but attempted to join issue on matters not alleged by the Defendant in his first plea : and for that, the replication to the second plea attempted to traverse and put in issue matter by law not traversable : namely, whether the said Sheriff arrested the said *George* by virtue of any such writ :
whereas

whereas the Plaintiff ought to have traversed the fact of the issuing of the writ, or the fact of an arrest, but ought not to have traversed matter of law ; and for that, the said replication to the second plea did not expressly deny, or admit the issuing of a writ of *capias ad satisfaciendum*, or the delivery thereof to the said Sheriff, but was altogether uncertain and unintelligible, and did not raise any certain issue. The Plaintiff joined in demurrer.

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Under these circumstances it was urged, in support of the motion, that the order had been irregularly and prematurely obtained, as it ought not, by the practice of the Court, to have been moved for so early ; because there had been no rule for bringing in the demurrer book, and consequently, the issue in law could not be put on the roll, and the Court could not, consequently, hear the argument ; for regularly, they can only look at the record. In this case, there was no rule at this moment, for bringing in the demurrer book to be enrolled, and the Defendant could not consequently proceed either by returning it, or in any other manner upon such an issue, which was not final until ultimately settled : and the Defendant is entitled to four days after the Plaintiff has joined in demurrer to return the demurrer book, during which time he may wave the demurrer and special plea and give the general issue : *Hale v. Smallwood (a)*. Until that was done, the record could not be considered perfect either in point of fact or in contemplation of law.

(a) 2 Tidd's Pr. 761. (7th Edit.)

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Jeremy opposed the application, relying on the practice of this Court, and particularly on the terms of an old rule of Hilary Term 1753, "concerning dilatory pleadings,"* which provides that

* The following is the Rule adverted to.

"Whereas, in divers actions and suits commenced in this Court, the Plaintiff many times in pleading concludes to the country, and the Defendant, not being obliged to join issue or demur till four days after the Plaintiff, are thereby delayed; for the prevention of which, for the future, IT IS ORDERED, that from and after the said first day of *Michaelmas* Term in all cases where the Plaintiff concludes to the country, the Plaintiff's Attorney, or Clerk in Court, may give notice of trial at the time of delivering his replication, or other subsequent pleading, in case issue shall be joined therein, or of executing a writ of inquiry in default of joining issue, which shall be deemed good notice of trial from the time of the delivery of such replication, or other subsequent pleading in case issue shall be joined: and if the Defendant doth not join issue on such replication or other subsequent pleading, and the Plaintiff doth sign judgment for want thereof, the Defendant's Attorney, or Clerk in Court shall take notice of executing a writ of enquiry, from the time that notice thereof was given as aforesaid: and it is further ordered, that in all cases where *the Defendant* demurs to the Plaintiff's declaration, replication, or other subsequent pleading, the Defendant's Attorney, or Clerk in Court shall be obliged to accept of notice of executing a writ of enquiry on the back of the joinder in demurrer; and in cases where the Defendant pleads a dilatory plea to which the Plaintiff is obliged to demur, in such case, the Defendant's Attorney, or Clerk in Court, shall be obliged to accept of notice of executing a writ of enquiry on the back of such demurrer: And it is further ordered, that in all cases where *the Plaintiff* demurs to the Defendant's plea, replication, or other subsequent pleading, and the Defendant joins in demurrer, the Plaintiff shall be at liberty to enter the issue in law upon the roll, and move for a concilium without giving the Defendant any rule to bring in the book of demurrer."

where

where the Plaintiff demurs to the Defendant's plea, replication, or other subsequent pleading, and the Defendant joins in demurrer, the Plaintiff shall be at liberty to enter the issue in law upon the roll, and move for a concilium without giving the Defendant any rule to bring in the book of demurrer—a rule which from the language of it, using the term “replication,” he submitted, must be taken to be mutual and applicable to demurrers by Defendants in which the Plaintiff should join, as well as to those filed by Plaintiffs; the object of it being clearly to expedite Plaintiffs under such circumstances, where, as in this case, the Plaintiff concludes to the country. He contended, therefore, that the Defendant was not entitled to four days to return the demurrer book.

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Parke, in reply, insisted that the part of the rule which had been relied on, was confined to demurrers filed by *Plaintiffs* and joined in by Defendants, in which cases the record would be complete as far as regarded the Defendant.

GRAHAM, *Baron*. There can be no doubt of the propriety of the rules of the Court generally speaking; but it is quite clear that in all these cases we may look to the nature of the pleadings, when we are called on to apply our rules to give effect to a point of practice: and if we see that the sole object of a demurrer is merely dilatory, we may interfere to check such malpractices as tend to cause a delay of justice, by dispensing with the four days usually required for the currency of such rules.

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rules. In this case the action is founded on a judgment; and in answer to that there is a foolish plea on which the Plaintiff takes issue, and then the Defendant demurs. It is surely quite fit that we should bend the rule a little if necessary, to disappoint the effect and intention of such proceedings.

GARROW, *Baron*. The Court cannot be blind to the intended perversion of justice attempted by such pleadings, the consequence of which has been the introduction of names for such devices in the practice of the Courts, as render it reproachful. Parties who have recourse to what is sometimes called a horse demurrer, must sometimes expect the Court to curb it where they can. This rule for a concilium must stand, and if there be really any thing in the demurrer, we will take care that the Defendant shall not be injured by it. It is perhaps very likely, however, that if he had had the demurrer book four days, that he would in the mean time have struck out the nonsense which he has put on the record.

Rule refused, but without Costs.

THE Demurrer now came on for argument.

Parke contended on the first point, that the denial of payment of the debt and damages did not amount to a denial of the sum of money alleged in the plea to have been paid.

On

On the second point, he insisted that replying to the allegations in the plea of a writ having been sued out and delivered to the Sheriff by way of protestation merely, and negating only that the Defendant was arrested *by virtue of* any such writ, was an insufficient replication to a positive plea, averring all those facts: and he submitted that the allegation "*virtute cujus*" being merely a consequence of the preceding matter, was not traversable in any case, and *a fortiori* in this form, as it was mere matter of law, citing *Bennet v. Firkins* (a), *The King v. Lyme Regis* (b), and *Doctor Grenville v. The College of Physicians* (c). In this case the Plaintiff not having traversed the preceding matter, it was therefore insisted that the replication was demurrable to.

Jeremy in support of the replication urged, that the traverse of the allegation in the plea with reference to the allegation in the declaration was sufficient, and put the whole matter of the first plea in issue.

On the second objection he submitted, that the words 'by virtue of such writ' following the allegation in the plea became necessary to be used in denying it; and were further necessary to distinguish this from any other process, under which

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June 26.

To a plea in an action on a judgment recovered, that the Plaintiff sued out a ca. sa. against the Defendant under and by virtue of which said writ, the Sheriff took and arrested the Defendant, and had him in custody for the debt and damages: replication protesting the suing out and delivering the writ to the Sheriff, and traversing that, under and by virtue, &c. the Sheriff took the Defendant, is sufficient, such an allegation being traversable, as being matter of law connected with fact.

(a) 1 Wms.'s Saund. 23. (Note 5), and the authorities referred to there.

(b) 1 Doug. 159.

(c) 12 Mod. Rep. 386.

the

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the Sheriff might have taken the Defendant into custody.

The Court determined that the replications were sufficient,—Mr. *Baron* Wood observing, that the latter allegation being at most matter of law connected with facts was traversable. They therefore gave

Judgment for the Plaintiff*.

* See 1 Wms.'s Saunders, p. 23, n. 5.

END OF TRINITY TERM.

REPORTS
 OF
CASES
 ARGUED AND DETERMINED
 IN THE
COURT OF EXCHEQUER
 AND
EXCHEQUER CHAMBER.

SITTINGS AFTER TRINITY TERM AND MICHAELMAS
TERM,
3 GEO. IV.

THE ATTORNEY-GENERAL v. CARL CASS.

IN the course of the last Term the Court granted a rule on the motion of *Platt* on behalf of the Defendant calling on the *Attorney-General*, to shew cause why the Defendant should not be discharged out of the custody of the Sheriff of *Essex*, on the ground that the Defendant had been illegally arrested and taken into custody, and therefore could not be legally detained.

The facts stated in the affidavit of the prisoner, were these:—He was taken into custody on the 26th of *May* last by several Officers of the Customs, near *Mistley*, in the county of *Essex*, on suspicion

1833.

Wednesday,
 10th July.

The Court will discharge a prisoner detained in custody under legal process (capias on an information for offences against the Revenue Laws) issued whilst the Defendant was in gaol, under an arrest which was originally illegal and without authority.

And they will not impose any terms on the Defendant on ordering his discharge.

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of having been engaged in running contraband goods, and was taken by them to *Mistley*. On the next day they conveyed him to *Harwich* and lodged him in gaol there, where he was confined till the 9th of *June* following. On that day he was taken to *Chelmsford* Gaol, by virtue of a warrant of the Sheriff of *Essex*, dated the 8th of *June*, addressed to the keeper of the gaol, and two bailiffs of the Sheriff, requiring them to take the Defendant and keep him [in the usual terms] so that the Sheriff might have his body before the Barons, &c. at *Westminster* on the 26th of *June*, to answer his Majesty, touching certain articles whereon he was impleaded by an information lately exhibited, &c. for the forfeitures of sums amounting to 1257*l*. The affidavit concluded by stating that “the cause for which the Defendant was detained upon the said warrant, was the same cause for which he was arrested on the 26th of *May*,” and that he had remained in prison ever since.

Under these circumstances, the present motion was made on the authority of the Case of the *Attorney-General v. Dorkings*, (a) wherein the Court had granted a similar rule in Trinity Term, which was afterwards made absolute on cause shewn by the *Attorney-General*.

The *Attorney-General*, *Clarke* and *Walton*, now shewed cause on an affidavit, stating that the Deponent—a searcher and landing and coast-waiter, in the service of the Customs, at *Mistley*—having

(a) *Ante*, p. 156.

found in a ditch near the shore on the 26th of *May*, a great number of half-anker casks of foreign spirits (geneva and brandy) he went on board a small vessel which he saw then lying on the shore, within forty yards of the spot (the *Tonge Juno* of *Rotterdam*) and finding on board of her some empty half-ankers and half-anker-slugs, he seized the boat, and detained her crew, (a) the Defendant and another man, both foreign subjects, and delivered them in charge to a constable, who took them to *Harwich*, and lodged them in gaol, there to abide the result of a statement of their case to the Commissioners. The affidavit of the Defendant was not contradicted, except, that it was stated that the *capias* on the information had not been issued for the same charge as that on which the Defendant had been originally arrested, which was alleged to be for an offence against the Revenue Laws, within the summary jurisdiction of local Magistrates.

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They endeavoured to distinguish this case from that of the *Attorney-General v. Dorkings*, on the ground of the different nature of the proceedings, and the state of facts in the latter not applying.

Platt, in support of the Rule, urged that if the offence on account of which the Prisoner had been in the first instance arrested, were within the summary jurisdiction given by Statute to neighbouring Magistrates, in order to render the imprisonment legal, the authority of a Justice of the Peace was necessary : and as the Prisoner had not

(a) Under the 58 Geo. 3. Ch. 76. § 45 Geo. 3. Ch. 121.

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been taken before a Magistrate, he was not in legal custody when the *Capias* issued, and therefore ought to be discharged.


RICHARDS, *Chief Baron*.—The Question is not whether the Defendant in this case was liable to be arrested for any offence against the Revenue Laws or on any other account ; but whether, under the circumstances, his apprehension was legal or not. It is certainly not shown that the original arrest was a lawful arrest. It does not appear that he was taken before a Magistrate, nor is any reason assigned for not doing so. If he were improperly detained at the time when the *Capias* issued it would be a monstrous abuse of the Process to procure it to be executed under such circumstances. The present appears to me to be a stronger case than that to which we have been referred, where we discharged a Defendant on a similar application the other day, made, like this, to the discretion of the Court.

GRAHAM, *Baron*.—The Question really seems to me to be, whether we shall permit a man illegally arrested, to be detained under a legal Process, issued during his detention. It is clear that the Defendant was originally illegally detained, because his first apprehension was not followed up as it ought to have been, by carrying him immediately before a Magistrate. It would be very dangerous to allow the Process of the Court to be so grossly abused.

WOOD,

WOOD, *Baron*.—I entirely concur in opinion.

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GARROW, *Baron*.—If we could entertain any doubt upon this application as to the course which we ought to pursue, it would be a reason for our discharging the party. This sort of proceeding even if practised without concerted management might, if not checked, lead to very dangerous consequences, encouraging Officers to consider themselves entitled to detain individuals during their pleasure, under pretence of obtaining instructions from their Board. I say this advisedly. In this case the Court are called on to protect the liberty, not indeed of the subject, but of those whom it is for the interest of the country to treat with favour—foreigners resorting here for the fair purposes of commerce.

Rule Absolute.

It was then required on the part of the Crown, that the Defendant should be discharged, on the terms of appearing to the Information, but

The Court refused to impose any terms.

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Wednesday,
10th July.

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[Demurrer to Rejoinders.]

To *Scire facias* against a Surety on Bond to the Crown, reciting that the principal was at the time, &c. a Clerk in the Ordnance Office, by means whereof he had been and would be entrusted with

THIS was a *Scire facias* against the Surety on Bond, 14th March, 1806, to the Crown, with the following condition :

“ WHEREAS the above-bounden *William Balme Ruddick* now is and for some time past has been

money, condition that the principal should from time to time during so long time as he should continue to hold the said place which he then held, or any other place in the said office, pay the money received by him as Clerk as aforesaid, and should also as well during the term of his holding the said office as afterwards, well and truly account for and deliver up to the Treasurer of the Ordnance Office all such money, &c. as should come to his hands or be committed to his care as a Clerk in the said Office—the Defendant pleaded that the principal did, &c. [in the words of the condition] REPLICATIONS (in substance) that the principal was at the time, &c. a Clerk to wit, second Clerk in the Ordnance Office, and continued in the office of such Clerk for the space of four years and until afterwards, to wit on the 31st January, 1810, the Plaintiff became, and was chief or first Clerk in the said office, and so continued till the several defaults, &c.; and that whilst he so continued chief or first Clerk he received money which he did not pay over to the Treasurer of the Ordnance: Secondly, that on the 6th of January, 1818, the principal gave to the Treasurer of the Ordnance an account of the monies received by him as such clerk, and of the balance of cash then in his hands on such account, and that he (the principal) ought to have paid and delivered up such balance to the Treasurer, but did not; Thirdly, that the principal after the making the said bond, and whilst he so continued Clerk as aforesaid, received money belonging to his Majesty in his said Office of Ordnance, a great part of which he, as such Clerk, ought to have paid on the 6th of January, 1818, to the said Treasurer, but did not: Fourthly, that after, &c. to wit, on the said 6th of January, the principal gave in an account of money received and paid by him (the principal,) so being a Clerk in the said office, and of the balance of cash then in his hands, on such account which, although it was the duty of the principal as such Clerk as aforesaid, to pay over, &c. he did not, &c. contrary to his duty as a clerk in the said office. REJOINDER—as to the first breach assigned in the replication—that at the time &c. the principal was a clerk in the said office, viz. second clerk, and that he continued therein till he became first clerk, in manner and form, &c. and that he was and continued first clerk until the twenty-sixth of February, 1810, when he was dismissed from his said place or office without the knowledge of the Defendant, and without notice to him: and that as to part of the money alleged to have been received by the principal whilst he so continued such first clerk, viz. one hundred pounds, the same was received by him whilst he was and continued such first clerk, and in the capacity of and as such first clerk as aforesaid, but that the residue was received by him not in the capacity of and as such clerk as aforesaid, but by virtue of and under another, and different office, which he then and there held] whilst he continued such clerk as aforesaid, and that the said part thereof (the hundred pounds) had been duly applied accordingly, &c.: Secondly, that at the time, &c. the principal was a clerk in the said office, and so continued till, (&c.)—the like allegation as in the first rejoinder to the bracket, stating the dismissal to have been on the second of March, in the same year, and averring that the principal had duly accounted for and paid all such money as he had received in his capacity of and as such clerk as aforesaid accordingly, &c. The third and fourth rejoinders were nearly *mutatis mutandis* in the same terms. The SURREJOINDER took issue on the averments in the first rejoinder, and demurred to the second, third, and fourth rejoinders, for insufficiency, uncertainty, and duplicity. DEMURRER allowed—those rejoinders, not being sufficient to maintain the plea.

“ a Clerk

“ a Clerk in the office of the Treasurer and Pay-
 “ master of his Majesty’s Ordnance, by means
 “ whereof he the said *William Balme Ruddick* has
 “ been and will be entrusted with the receipt and
 “ payment of divers sums of money and securities
 “ for money: now the condition of the above-
 “ written obligation is such that if the said *Wil-*
 “ *liam Balme Ruddick* do and shall from time to
 “ time during so long time as he shall continue to
 “ hold and exercise the said place or office, which
 “ he now holds and exercises as aforesaid, or any
 “ other place or office in the said office of Trea-
 “ surer and Paymaster of his Majesty’s said Ord-
 “ nance, duly and faithfully pay and apply all
 “ such sum and sums of money as hath or have
 “ been or shall or may be received by him as
 “ Clerk as aforesaid, in such manner and at such
 “ time and times as the same ought to be paid
 “ and applied, and also do and shall from time to
 “ time as well during the term of his holding the
 “ said office as afterwards, well and truly account
 “ for and deliver up unto the Treasurer and Pay-
 “ master of his Majesty’s said Ordnance for the
 “ time being all such sum and sums of money,
 “ securities for money, books, deeds, papers, and
 “ writings, as have or shall or may come to the
 “ hands, custody, or power, or be committed to
 “ the care of him the said *William Balme Ruddick*
 “ as a Clerk in the said office of the said Treasurer
 “ and Paymaster, when and as the same ought to
 “ be accounted for and delivered up, and also if
 “ the said *William Balme Ruddick* do and shall in
 “ all things well and faithfully execute and discharge
 “ his

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" *his duty as a Clerk in the said office, and do and*
 " *perform all matters and things whatsoever incum-*
 " *bent upon him to do and perform therein, then*
 " *the above written obligation to be void or else*
 " *to be and remain in full force and virtue."*

Plea.

" That the said *William Balme Ruddick* did
 " from time to time during so long time as he
 " continued to hold and exercise the said place
 " or office which he then held and exercised as
 " aforesaid, or any other place or office in the said
 " *Office of the said Treasurer and Paymaster of his*
 " *Majesty's Ordnance*, duly and faithfully pay
 " and apply all such sum and sums of money as
 " were received by him *as Clerk as aforesaid*, in
 " such manner and at such time and times as the
 " same ought to be paid and applied, and also
 " did," &c. &c. (in the words of the condition of
 the bond to the end) and this he the said *William*
Forman is ready to verify; wherefore, he prays
 judgment if his said Majesty ought to have exe-
 cution against him for the said sum of ten thou-
 sand pounds, or for any part thereof, and that he
 may be discharged by the court here as to the
 premises aforesaid.

Replication by
 the ATTORNEY
 GENERAL, as-
 signing
 Breaches.

First, That the said *William Balme Ruddick*,
 in the condition of the said writing obligatory
 mentioned, was, at the time of making the said
 writing obligatory, a clerk, to wit, second clerk
 in the office of the Treasurer and Paymaster of his
 late Majesty's Ordnance, in the condition of the
 said writing obligatory mentioned, and continued
 in

in the office of *such clerk* as aforesaid, for a long time after the making of the said writing obligatory, to wit, for the space of four years, and until afterwards, to wit, on the *thirty-first day of January*, in the year of our Lord 1810. The said *William Balme Ruddick* became and was chief or first clerk in the said office of the Treasurer and Paymaster of his said late Majesty's Ordnance, as aforesaid, and that the same *William Balme Ruddick* was and continued chief first clerk from thence for a long time, to wit, until the several defaults of payment herein after mentioned; and that the said *William Balme Ruddick* whilst he so continued chief or first clerk in the said last mentioned office, received divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of twenty thousand pounds, of lawful money of Great Britain to wit, at &c.; but the said *Attorney General* further says, that although it was the duty of the said *William Balme Ruddick*, as such clerk as aforesaid, to have paid a great part of the sum of twenty thousand pounds so received by him as aforesaid, to wit, the sum of ten thousand pounds afterwards, to wit, on the sixth day of January, in the year of our Lord 1818, to *Thomas Alcock, Esq.* the Treasurer and Paymaster of his said late Majesty's Ordnance, or to such Treasurer and Paymaster for the time being, on request. Yet the said *William Balme Ruddick* did not then, or at any time since, pay the said last mentioned sum of money, or any part thereof, to the said *Thomas Alcock*, the said then Treasurer and Paymaster of the said Ordnance; nor hath the said *William Balme Ruddick* at any time

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time since paid such last mentioned sum of money, or any part thereof, to such Treasurer and Paymaster for the time being; although the said *William Balme Ruddick* afterward, to wit, on the same day and year last aforesaid, and often since at &c. hath been requested by such Treasurer and Paymaster to pay him the same; nor hath the said *William Balme Ruddick* in any manner paid or applied the said last mentioned sum of money as he ought to have done, as such clerk, as aforesaid; but on the contrary thereof, the said *William Balme Ruddick* hath wholly neglected and refused so to do; and the same sum of money still is wholly in arrear and unpaid, to wit, at &c. contrary to the duty of the said *William Balme Ruddick's* said place or office, and contrary to the form and effect of the said condition of the said writing obligatory; and this the said *Attorney General*, on behalf of his present Majesty, is ready to verify: wherefore he prays judgment on behalf of his said Majesty, and that his said Majesty may have his execution against the said *William Forman* for the said ten thousand pounds, in the said writ and writing obligatory mentioned.

2d. Replication.

Secondly, That after, &c. and before, &c. at, &c. and before, &c. the said *W. B. Ruddick* did give unto the said *Thomas Alcock*, the then Treasurer and Paymaster of his said late Majesty's Ordnance, an account of the monies received and paid or retained by him, the said *W. B. Ruddick*, as such clerk as aforesaid, and of the balance of cash then in his hands, on such account so rendered as aforesaid,

aforesaid, which balance then and there amounted to a large sum of money, to wit, the sum of ten thousand pounds; and although it was the duty of the said *W. B. Ruddick*, as such clerk as aforesaid, *to have then paid and delivered up* the said last mentioned balance, to the said *Thomas Alcock*, the then Treasurer and Paymaster of his said late Majesty's Ordnance, or to such Treasurer and Paymaster for the time being, on request. Yet the said *W. B. Ruddick* did not then or at any time since, pay or deliver up unto the said *Thomas Alcock*, the then Treasurer and Paymaster of his said late Majesty's Ordnance, or at any time afterwards, to such Treasurer and Paymaster for the time being, the said last mentioned balance or any part thereof, although the said *W. B. Ruddick*, afterwards, to wit, on the same day and year last aforesaid, at, &c. hath been requested by such Treasurer and Paymaster to pay and deliver up to him the said balance, but the said *W. B. Ruddick* then and there wholly neglected and refused, and from thence hitherto hath wholly neglected and refused so to do; and the said last mentioned balance is still wholly in arrear and unpaid, contrary to the form and effect of the said condition of the said writing obligatory. And this the said *Attorney General*, for our said Lord the now King, is ready to verify, wherefore, &c.

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Thirdly, That before, &c. and at the time, &c. and for a long time afterwards, to wit, from thence until the several defaults of payment hereinafter mentioned, the said *W. B. Ruddick* was a clerk in the

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time since paid such last mentioned sum of money, or any part thereof, to such Treasurer and Paymaster for the time being; although the said *William Balme Ruddick* afterward, to wit, on the same day and year last aforesaid, and often since at &c. hath been requested by such Treasurer and Paymaster to pay him the same; nor hath the said *William Balme Ruddick* in any manner paid or applied the said last mentioned sum of money as he ought to have done, as such clerk, as aforesaid; but on the contrary thereof, the said *William Balme Ruddick* hath wholly neglected and refused so to do; and the same sum of money still is wholly in arrear and unpaid, to wit, at &c. contrary to the duty of the said *William Balme Ruddick's* said place or office, and contrary to the form and effect of the said condition of the said writing obligatory; and this the said *Attorney General*, on behalf of his present Majesty, is ready to verify: wherefore he prays judgment on behalf of his said Majesty, and that his said Majesty may have his execution against the said *William Forman* for the said ten thousand pounds, in the said writ and writing obligatory mentioned.

2d. Replication.

Secondly, That after, &c. and before, &c. at, &c. and before, &c. the said *W. B. Ruddick* did give unto the said *Thomas Alcock*, the then Treasurer and Paymaster of his said late Majesty's Ordnance, an account of the monies received and paid or retained by him, the said *W. B. Ruddick*, as such clerk as aforesaid, and of the balance of cash then in his hands, on such account so rendered as aforesaid,

aforesaid, which balance then and there amounted to a large sum of money, to wit, the sum of ten thousand pounds; and although it was the duty of the said *W. B. Ruddick*, as such clerk as aforesaid, to have then paid and delivered up the said last mentioned balance, to the said *Thomas Alcock*, the then Treasurer and Paymaster of his said late Majesty's Ordnance, or to such Treasurer and Paymaster for the time being, on request. Yet the said *W. B. Ruddick* did not then or at any time since, pay or deliver up unto the said *Thomas Alcock*, the then Treasurer and Paymaster of his said late Majesty's Ordnance, or at any time afterwards, to such Treasurer and Paymaster for the time being, the said last mentioned balance or any part thereof, although the said *W. B. Ruddick*, afterwards, to wit, on the same day and year last aforesaid, at, &c. hath been requested by such Treasurer and Paymaster to pay and deliver up to him the said balance, but the said *W. B. Ruddick* then and there wholly neglected and refused, and from thence hitherto hath wholly neglected and refused so to do; and the said last mentioned balance is still wholly in arrear and unpaid, contrary to the form and effect of the said condition of the said writing obligatory. And this the said *Attorney General*, for our said Lord the now King, is ready to verify, wherefore, &c.

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Thirdly, That before, &c. and at the time, &c. and for a long time afterwards, to wit, from thence until the several defaults of payment hereinafter mentioned, the said *W. B. Ruddick* was a clerk in the

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the office of the Treasurer and Paymaster of his said late Majesty's Ordnance ; and the said *W. B. Ruddick* after the making of the said writing obligatory, and whilst he so continued a clerk as last aforesaid, received divers sums of money belonging to his said late Majesty, in his said office of Ordnance, amounting in the whole to a large sum of money, to wit, the sum of twenty thousand pounds, of like lawful money, to wit, at, &c. A great part of which last mentioned sum of money, to wit, the sum of ten thousand pounds ; he the said *W. B. Ruddick*, as such clerk as aforesaid, ought afterwards, to wit, on the said sixth day of *January*, in the said year of our Lord, 1818, to have paid to the said *Thomas Alcock*, the then Treasurer and Paymaster of his said late Majesty's Ordnance, or to such Treasurer and Paymaster for the time being on request. Yet the said *W. B. Ruddick* did not then, or at any time since, pay the said last mentioned sum of ten thousand pounds, or any part thereof to the said *Thomas Alcock*, the said then Treasurer and Paymaster of the said Ordnance ; nor hath the said *W. B. Ruddick* at any time since paid such last mentioned sum of money, or any part thereof to the Treasurer and Paymaster of his Majesty's Ordnance for the time being ; although the said *W. B. Ruddick* afterwards, to wit, on the same day and year aforesaid, and often since, at *Westminster* aforesaid, in the county aforesaid, hath been requested by such Treasurer and Paymaster, to pay him the same ; but on the contrary thereof, the said *W. B. Ruddick* hath wholly neglected and refused so to do, and the same sum of money still

is

is wholly in arrear and unpaid, to wit, at, &c. aforesaid, contrary to the duty of the said *W. B. Ruddick*, as a Clerk in the said office of Treasurer and Paymaster of his said late Majesty's Ordnance, and contrary to the form and effect of the said writing obligatory, and this, &c. wherefore, &c.

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Fourthly, That after, &c. and before, &c. to wit, on the said sixth day of *January*, in the year 1818, at, &c. the said *W. B. Ruddick* did give unto the said *Thomas Alcock*, the then Treasurer and Paymaster of his said late Majesty's Ordnance, on account of the monies belonging to his said late Majesty, in his said Office of Ordnance received and paid or retained by him, the said *W. B. Ruddick*, so being a Clerk in the said office, and of the balance of cash then in his hands on such account so rendered as aforesaid, which balance then and there amounted to a large sum of money, to wit, the sum of ten thousand pounds, and although it was the duty of the said *W. B. Ruddick* as such Clerk as aforesaid, to have then paid and delivered up the said last mentioned balance to the said *Thomas Alcock* the then Treasurer and Paymaster of his said late Majesty's Ordnance, or to the Treasurer and Paymaster of such Ordnance for the time being, yet the said *W. B. Ruddick* did not then or at any time since pay or deliver up unto the said *Thomas Alcock*, the then Treasurer and Paymaster of his said late Majesty's Ordnance, or at any time afterwards, to the Treasurer and Paymaster of his Majesty's Ordnance for the time being, pay or deliver up, &c. the said last mentioned

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tioned balance or any part thereof, although the said *W. B. Ruddick* afterwards, to wit, on the same day and year last aforesaid, and often since, at *Westminster* aforesaid in the county aforesaid, was requested by such Treasurer and Paymaster to pay and deliver up to him the said last mentioned balance, but the said *W. B. Ruddick* then and there and from thence hitherto hath wholly neglected and refused so to do, and the same balance is still wholly in arrear and unpaid *contrary to the duty* of the said *W. B. Ruddick* as a Clerk in the said office of Treasurer and Paymaster of his said late Majesty's Ordnance, and contrary, &c. and this, &c. Wherefore, &c.

Rejoinder to
first Breach.

Rejoinder, *executio non*, because protesting that the said replication and the matters therein contained in manner and form as the same are above pleaded and set forth are wholly insufficient, and that the said *William Forman* is not bound by law to make any answer thereto, nevertheless by way of rejoinder the said *William Forman* as to the said *first* supposed breach of the condition of the said writing obligatory therein alleged and set forth, saith that true it is that the said *William Balme Ruddick* was at the time of making the said Writing Obligatory a Clerk, that is to say, Second Clerk in the office of Treasurer and Paymaster of his said late Majesty's Ordnance, and that he continued in the place or office of such Clerk as aforesaid, until he became and was Chief or First Clerk in the said office of Treasurer and Paymaster aforesaid, in manner and form as the said

said Attorney-General, on behalf of his said Majesty, hath above alleged. And the said *William Forman* further saith, that the said *William Balme Ruddick* was and continued Chief or First Clerk in the said office of Treasurer and Paymaster of his said late Majesty's Ordnance as aforesaid, from thence for a long space of time, that is to say, until the *twenty-sixth day of February, 1810, when he was dismissed from his said place or office of such Clerk as last aforesaid, without the knowledge of or any notice of such dismissal* being given to the said *William Forman*, to wit, at *Westminster* aforesaid in the county aforesaid. And the said *William Forman* further saith, that as to part of the said sums of money in the said first breach mentioned and therein alleged to have been received by the said *William Balme Ruddick* whilst he so continued Chief or First Clerk in the last mentioned office, that is to say, as to one hundred pounds thereof the same was received by the said *William Balme Ruddick* whilst he so continued Chief or First Clerk as aforesaid in the capacity of and as such Clerk as aforesaid, but that the residue of the said sums of money in the said first breach mentioned, was received by him the said *William Balme Ruddick* not in the capacity of or as such Clerk as aforesaid, but by virtue of and under another and different office and place, or other and different offices and places, which the said *William Balme Ruddick* then and there held whilst he continued such Clerk as aforesaid, to wit, at *Westminster* aforesaid in the county aforesaid. And the said *William Forman* further saith, that
the

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the said *William Balme Ruddick* hath duly paid to the said *Thomas Alcock*, and to the Treasurer and Paymaster for the time being, and hath duly applied as he ought to have done as such Clerk as aforesaid so much of the said sum in the said first breach mentioned as was received by him in his capacity of and as such Clerk as aforesaid according to the true intent and meaning of the condition of said Writing Obligatory, and this the said *William Forman* is ready to verify. Wherefore he prays judgment if his said Majesty ought by reason of any thing in the said first breach mentioned, to have his execution against the said *William Forman* for the said ten thousand pounds in the said Writ and Writing Obligatory mentioned or any part thereof, &c.

Rejoinder
 to second
 Breach.

And the said *William Forman* as to the said breach of the said condition of the said writing obligatory in the said replication secondly above mentioned and set forth, says that the said *William Balme Ruddick* was at the time of making the said writing obligatory a Clerk in the office of Treasurer and Paymaster of his said late Majesty's Ordnance, and so remained and continued from thence for a long space of time (that is to say) until the second day of March, one thousand eight hundred and ten, when he was dismissed from his said place or office of such clerk as aforesaid, without the knowledge of or any notice of such dismissal being given to the said *William Forman* to wit, at *Westminster* aforesaid, in the county aforesaid; and the said *William Forman* further says,

says, that as to part of the said sums of money in the said second breach mentioned, and therein alleged to have been received and retained by the said *William Balme Ruddick* as such Clerk as aforesaid, (that is to say) as to the sum of one hundred pounds thereof, the same was received by the same *William Balme Ruddick* in the capacity of and as such Clerk as in that breach mentioned, but that *the residue* of the said monies was received by him the said *William Balme Ruddick* not in the capacity of or as such Clerk as aforesaid, but by virtue of and under another and different office and place or other and different offices and places which the said *William Balme Ruddick* then and there held, to wit at *Westminster* aforesaid in the county aforesaid. And the said *William Forman* further saith that the said *William Balme Ruddick* hath duly accounted for unto the said *Thomas Alcock* and unto the Treasurer and Paymaster for the time being as he ought to have done as such Clerk as aforesaid, and hath duly paid over to them, respectively, so much of the said sum, in the said second breach mentioned, as was received by him in his capacity of and as such Clerk as aforesaid according to the true intent and meaning of the condition of the said writing obligatory, and this the said *William Forman* is ready to verify. Wherefore he prays judgment if his said Majesty ought, by reason of any thing in the said second breach alledged, to have his execution against the said *William Forman* for the said ten thousand pounds in the said writ and writing obligatory mentioned or any part thereof, &c.

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Rejoinder to
third Breach.

And the said *William Forman*, as to the said breach of the said condition of the said writing obligatory *thirdly* above set forth says, that true it is that the said *William Balme Ruddick* was, at the time of making the said writing obligatory, a clerk in the office of the Treasurer and Paymaster of his said late Majesty's Ordnance as the said Attorney-General hath also in the said replication alledged. And the said *William Forman* further saith that the said *William Balme Ruddick* continued in the place or office of such Clerk as in that breach mentioned for a long space of time, (that is to say) until the *twenty-sixth day of February, one thousand eight hundred and ten, when he was dismissed* from his said place or office of Clerk as last aforesaid without the knowledge of or any notice of such dismissal being given to the said *William Forman*, to wit at *Westminster* aforesaid in the county aforesaid. And the said *William Forman* further saith that, as to part of the said sums of money in the said *third* breach mentioned, and therein alledged to have been received by the said *William Balme Ruddick* after the making of the said writing obligatory and whilst he so continued a Clerk as last aforesaid, (that is to say) the sum of one hundred pounds thereof, the same was received by the said *William Balme Ruddick* whilst he so continued Clerk as aforesaid in the capacity of and as such Clerk, but that the residue of the said sum in that breach mentioned was received by him the said *William Balme Ruddick* not in the capacity of or as such Clerk as aforesaid,

said, but by virtue of and *under another and different office* and place or other and different offices and places which the said *William Balme Ruddick* then and there held, to wit at, &c. And the said *William Forman* further saith that the said *William Balme Ruddick* hath duly paid to the said *Thomas Alcock* and to the Treasurer and Paymaster for the time being, and hath duly applied as he ought to have done as such Clerk as last aforesaid, so much of the said sums in the said third breach mentioned as was received by him in his capacity of and as such Clerk as aforesaid, according to the true intent and meaning of the condition of the said writing obligatory, and this the said *William Forman* is ready to verify. Wherefore, &c.

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Rejoinder to
third Breach.

And the said *William Forman*, as to the said breach of the condition of the said writing obligatory *lastly* above set forth, says that the said *William Balme Ruddick* was, at the time of making the said writing obligatory, a Clerk in the office of Treasurer and Paymaster of his said late Majesty's Ordnance, and that he continued in the place or office of such clerk as aforesaid, from thence, for a long space of time, that is to say, until the *second day of March, one thousand eight hundred and ten, when he was dismissed* from his said place or office of such Clerk as last aforesaid, without the knowledge of or any notice of such his dismissal, being given to the said *William Forman*, to wit at *Westminster* aforesaid, in the county aforesaid. And the said *William Forman* further says that, as to part of the said monies in the said last breach

Rejoinder to
fourth Breach.

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Rejoinder
to fourth
Breach.

mentioned, and therein alledged to have been received and retained by the said *William Balme Ruddick*, so being a Clerk in the said office as aforesaid, (that is to say) as to the sum of one hundred pounds thereof, the same was received by the said *William Balme Ruddick* in the capacity of and as such Clerk as in that breach mentioned, but that the residue of the said monies was received by him the said *William Balme Ruddick* not in the capacity of and as such Clerk as aforesaid, but by virtue of and under another and different office and place, or other and different offices and places, which the said *William Balme Ruddick* then and there held, to wit at *Westminster* aforesaid, in the county aforesaid. And the said *William Forman* further saith that the said *William Balme Ruddick* hath duly accounted for to the said *Thomas Alcock*, and to the Treasurer and Paymaster, for the time being, of his said late Majesty's Ordinance as he ought to have done as such Clerk as aforesaid, and hath duly paid over to the said *Thomas Alcock* and such other Treasurer and Paymaster, respectively, all and every the sum and sums of money which have been received by the said *William Balme Ruddick* so being a Clerk in the said office as in that breach mentioned, and which were received by him in his capacity of and as such Clerk as last aforesaid, according to the form of the condition of the said writing obligatory, and this the said *William Forman* is ready to verify. Wherefore he prays judgment, if, &c.

Surrejoinder.

Surrejoinder:—*Precludi non* as to the rejoinder to the first breach of the condition pleaded in

in the Replication, because, protesting the insufficiency of the rejoinder, it averred that the said *William Balme Ruddick* was not dismissed from his said place or office of such Clerk as aforesaid in manner and form as the said *William Forman* hath in his said rejoinder to the said first breach in that behalf above alledged, and this the said *Attorney-General* on behalf of his said Majesty prays may be enquired of by the country, &c. And further that the said *William Balme Ruddick* did receive the said sums of money in the said first breach mentioned in the capacity of or as such Clerk as aforesaid, and did not receive the said residue thereof by virtue of and under another and different office and place or other and different offices and places, which the said *William Balme Ruddick* held whilst he continued such Clerk as aforesaid, in manner and form as, &c. concluding to the country. And further that the said *William Balme Ruddick* did not pay to the said *Thomas Alcock*, or to the Treasurer and Paymaster for the time being, and did not apply, as he ought to have done, as such Clerk as aforesaid, so much of the said sum in the said first breach mentioned as was received by him in his capacity of and as such Clerk as aforesaid, according to the true intent and meaning of the said condition of the said writing obligatory in manner and form as the said *William Forman* hath in his said rejoinder to the said first breach in that behalf above alledged, concluding to the country, &c.

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Surrejoinder.

Demurrer to rejoinder to second Breach.— And the said *Attorney-General*, on behalf of his

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rejoinder to se-
cond Breach.

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Demurrer to
rejoinder to se-
cond Breach.

his said Majesty, as to the said plea of the said *William Forman* by him above pleaded by way of rejoinder as to the said *second* breach of the condition of the said writing obligatory by the said *Attorney-General* secondly above alledged, says that the said rejoinder of the said *William Forman* to the said second breach above alledged, and the matters therein contained, in manner and form as the same are above pleaded, are insufficient in law to bar his said Majesty from having his said execution against the said *William Forman* for the said ten thousand pounds in the said writ and writing obligatory mentioned, to which said rejoinder to the said second breach so as aforesaid pleaded the said *Attorney-General*, on behalf of his said Majesty, hath no occasion, nor is he obliged by the law of the land to answer. And this the said *Attorney-General*, on behalf of his said Majesty, is ready to verify, wherefore, for the insufficiency of the said rejoinder to the said second breach, his said Majesty's *Attorney-General*, on behalf of his said Majesty as before, prays judgment, and that our said Lord the now King may have his execution against the said *William Forman* for the said ten thousand pounds in the said writ and writing obligatory mentioned, &c. And for *causes of demurrer in law* to the said last mentioned rejoinder, the said *Attorney-General* of our said Lord the King, assigns to the Court here the following causes; that is to say, for that the said *William Forman* in and by his said rejoinder to the said second breach hath alledged that the said *William Balme Ruddick* was dismissed from his said place or office of Clerk in

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rejoinder to se-
cond Breach.

in the said office of Treasurer and Paymaster of the Ordnance, as in that rejoinder is mentioned, *and also alledges that the said William Balme Ruddick well and truly paid and applied part of the said monies in the said second breach mentioned, according to the true intent and meaning of the condition of the said writing obligatory, and that the said William Balme Ruddick received the residue of such monies not in the capacity of or as such Clerk as aforesaid, but by virtue of and under another and different office and place, or other and different offices and places, without shewing by virtue of what office or place or what offices or places such monies were received, and whether the same offices or places were in the office of Treasurer and Paymaster of the Ordnance or otherwise, and for that the said William Forman insists upon several matters of defence in his same rejoinder which is thereby double and inconsistent. And also for that the same rejoinder, although it alledges the said dismissal of the said William Balme Ruddick from the said place or office on a particular day, does not alledge whether such dismissal was before or after the receipt of the said monies in the said second breach mentioned, so that no proper issue can be taken on that allegation; and for that the said rejoinder to the said second breach is in other respects double, inconsistent, argumentative, uncertain, and wants form, &c.*

The *Attorney-General* also demurred in precisely the same terms to the rejoinder pleaded to the third and fourth breaches assigned in the replication.

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The Defendant joined issue on the surrejoinder to the first breach, and joined in demurrer to the rejoinders to the other breaches.

Walton, in support of the demurrer, contended that it ought to have been averred in the rejoinders demurred to, at what time the principal in the bond received the residue of the money admitted to have been received by him, that it might appear on the pleadings whether the money had been so received by him during his continuance as a clerk in the office for his good conduct, in which situation the Defendant was surety—*Bolton v. Canham (a)*; for that it would be no answer to these replications to say, as pleaded by the rejoinders, that he received the money in another capacity, if he received it whilst he was such Clerk; as the terms of the bond were sufficient to cover any misconduct on the part of *Ruddick in any employment or situation* which he might also hold in the office *during the time that he should continue Clerk there*.

He also contended that it was incumbent on the Defendant to shew by his rejoinders, in answer to the replications, that the default in the Clerk's duty occurred after his dismissal from the office of Clerk, otherwise if this general rejoinder of dismissal were good, it would be sufficient to prove a dismissal at any time to support it: and he further insisted that the Defendant ought to have stated in terms in *which* other office the party received the money,

(a) Pollexf. Rep. 132.

and

and whether such office was an office in that of the Treasurer and Paymaster of the Ordnance; as otherwise the effect of permitting such loose pleading would be to embarrass every case the Crown suing on such a bond, and to place insuperable difficulties in the way of such suits; because it would be impossible to take a precise or material and effective issue on such allegations.

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It was further objected to the rejoinders to the second, third, and fourth breaches assigned by the replication, that they were double, in averring the dismissal of *Ruddick* without notice to *Forman*, and the receipt of the money not as Clerk, and the payment over to the Treasurer of all that he had received as Clerk in the office;—and also that they presented the semblance, at least, of two grounds of defence to the proceeding, if indeed they did not in effect set up two distinct defences:—that if the Crown should take issue on the first it would be immaterial, for if *Ruddick* had been dismissed, and without notice to *Forman*, which might have been the fact, and a consequence of the very matters now complained of, that would be no answer to a proceeding on the bond, founded on the liability of the surety under the circumstances, unless the default occurred after the dismissal: and the Crown having taken issue on the question of dismissal (which might be matter of fact or of law) in another part of the record, would not preclude the objection to the other rejoinders which had been demurred to on that ground. He therefore submitted that those rejoinders were bad, and that there

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there must be Judgment for the Crown on the breaches assigned to which they applied.

Tindal, in support of the rejoinders, submitted that the real and substantial question intended to be raised by the record being the liability of the surety to the extent to which it was sought to charge him—the Crown on the one hand requiring him to answer for all the misconduct of the principal in making good all the deficiencies charged against him, arising as well from neglect of duty in his capacity of Clerk as in any other situation which he might have filled in the office; whilst on the other the Defendant insists that he is liable only for the non-performance of the duty of *Ruddick* as Clerk in the office,—that question had been fairly and fully brought forward by the pleadings, and had been raised by the rejoinder to the first breach assigned by the replication, which would dispose of the only question in the cause. Whatever embarrassment or perplexity was occasioned by the pleadings, he urged, was attributable to the nature of the replications, which he submitted had not pursued the tenor of the bond, but had raised up liabilities incompatible with the obligation into which the Defendant had really entered by executing that instrument, and had tendered immaterial issues, which the Defendant was therefore not obliged to notice, the first breach having effectually put every thing in issue which could be litigated between the Crown and the Defendant.

The principal difficulty (it was observed) had arisen from the circumstance that the bond contained the words "or any other office in the office of Treasurer and Paymaster of his Majesty's Ordnance," which appeared to extend the Defendant's liability as surety to any situation in that office the principal might hold there; but it was insisted that the following words "as Clerk as aforesaid" confined the terms of the bond to what was obviously and necessarily the meaning of the parties, the responsibility of the surety for the good conduct of the principal as a Clerk in the Ordnance office, with reference to the particular situation which he then held or might hold of the same description, namely, as Clerk, and not whilst he was in any other or different situation in the office, such for instance as deputy Treasurer, which in fact (it was stated) he had been.

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It was insisted that there was no insufficiency in the rejoinders in not stating when the money was received by the principal, for that would be necessarily matter of evidence.

The breaches assigned in the second and fourth replications for not paying over the balance due on an account given in by the principal, it was contended, were insufficiently assigned, and tendered immaterial issues; because the Defendant as surety could not be bound by such an account: and therefore he was not called on to answer those allegations, and he would have done wrong to have taken issue on them, as it would have fixed him

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him with the account whether true or false. The only liability to which he had rendered himself subject by the terms of the bond was, that the principal should account for and pay to the Treasurer all money that he ought to account for and pay as Clerk in the Ordnance office; all, in short, that he should receive as such Clerk.

On the objection of duplicity of pleading in the rejoinders demurred to, it was submitted, that the Defendant had in effect done nothing more than answer the two branches of the replications separately, by averring facts which denied the allegations: and if the Defendant had not gone so far as to say that the principal had paid over all that he had received it would have been insufficient; although he had stated a sum certain, for that statement would not conclude either party: and the amount actually received and paid would be, notwithstanding, matter of evidence on either side, and that alone would be the substantial question between the parties.

It was finally insisted that, for a surety made Defendant in a proceeding of this nature, to deny the receipt by the principal of money as clerk was sufficient, and that there was no onus on him to shew any thing beyond that negation, which was a sufficient answer to the proceeding on the bond;—and that there was no pretence for suggesting that he ought to be called on to state in what capacity the principal really did receive the money, for that it lay on the Crown to shew that he had in fact received

ceived money *as Clerk* which he had not accounted for and paid over to the Treasurer and Paymaster of the Ordnance:—in short, that it was incumbent on the Crown to support the affirmation of the issue which the *Attorney-General* had tendered, and to maintain the charge. It was therefore contended that the rejoinders were sufficient, and that the demurrer could not be supported.

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 FORMAN.

Walton having replied, the Court delivered Judgment.

RICHARDS, *Chief Baron*.—We are of opinion that these rejoinders cannot be sustained, and therefore the demurrer must be allowed.

GRAHAM, *Baron*.—I am almost afraid to trust my own judgment in this case, but I am of opinion, on looking at the whole of the pleadings on this record, that the demurrer is well founded. The rejoinders are in effect double, certainly. As to the replications I cannot see any valid objection to them, they are founded substantially on the condition of the bond. The surety enters into an obligation for the general good conduct of the principal during his continuance in office. It is quite clear that there was a higher confidence reposed in him in consideration of his having given such security as a clerk in the office, and it was probably on that account that he was at the same time appointed to other offices. The replication distinctly sets out the terms of the condition, and assigns

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assigns the breach well, because the principal was bound to account for monies coming to his hands during his continuance in the office as clerk. As the rejoinders to that replication are not valid, the demurrer must be allowed.

Wood, B.

Wood, Baron.—These pleas are certainly very perplexing; but on the whole I am inclined to think that the Crown is entitled to judgment.

The first question is, what is the condition of the bond? (his Lordship stated the recital of the bond and the condition of the obligation.) It is said that this condition is to be construed as being limited to such sums of money as should come to the Defendant's hands as clerk in the office of the Treasurer and Paymaster of his Majesty's Ordnance; whereas the plain sense and meaning of the condition is, that so long as he shall continue to hold the place or office which he then held, or any other place or office in the office of Treasurer and Paymaster of the Ordnance, he should be bound to pay and apply and account for all such sums of money as should be received by him during his continuance in the office: and it extends to such sums as he should receive either as Clerk in the office, or by virtue of any other place or office which he might also hold in the office whilst he should continue to be employed as Clerk therein.

That being the condition of the bond, I think
 the

the surety is liable for all such sums of money as the principal received whilst he continued to hold any office in the Ordnance department. Then it is not denied, that whilst he did hold such office money had come to his hands which he did not pay over, and of which he did not render any account. But, it is said that he received the money for which he had not accounted in virtue of some other office which he held in the office of Treasurer of the Ordnance and not *as Clerk*, and, therefore, that for such sums the surety is not liable. Now the plea is, that the principal did, so long as he continued to hold the place which he then held, faithfully pay and apply all such sums as were received by him as clerk, and did during that time account, and so forth, putting it precisely as I have done, that he paid all the sums received by him during his continuance in the particular office.

Four breaches are then assigned by the replication. On the first breach issue is joined. The second and fourth breaches it is said are improperly assigned, because it is alleged that the principal did render an account, from which it appeared that a balance was due from him and unpaid; and it is said that the account rendered by a principal does not conclude the surety. I however see no distinction which can be taken in such a case between a principal and his surety. I think the account rendered by a principal is sufficient to bind the surety *prima facie* at least; but at all events he was bound to account, and therefore I

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am of opinion that those breaches are well assigned.

To the third breach there is no objection, for on that the question of the account does not arise. It is clear that an account is *prima facie* evidence of a balance due.

Then the Defendant puts in a rejoinder which it now becomes necessary to consider. I take it to be essential in pleading that a rejoinder should maintain the assertions in the plea. The allegations in this plea are, that the Defendant's principal did from time to time *during so long time as he continued to hold and exercise the said place or office which he then held and exercised as aforesaid, OR ANY OTHER PLACE OR OFFICE in the office of the said Treasurer and Paymaster of his Majesty's Ordnance*, duly and faithfully pay and apply all such sum or sums of money as were received by him as clerk as aforesaid. The allegation in the rejoinder is, that as to part of the said sums of money in the said first breach mentioned, alleged to have been received by the said *W. B. Ruddick whilst he so continued chief or first clerk* in the last mentioned office, that is to say, as to one hundred pounds thereof, the same was received by him whilst he so continued chief or first clerk as aforesaid, in the capacity of and as such first clerk as aforesaid, *but that the residue (&c.)* was received by him not in the capacity of or as such clerk as aforesaid, but by virtue of and under another and different office
 and

and place, or other and different offices and places which he then and there held whilst he continued such Clerk as aforesaid. Now, he does not in that rejoinder allege, as in his plea, that the residue was received by him not whilst he continued to hold and exercise the office of Clerk or any other place or office in the office of the said Treasurer and Paymaster of his Majesty's Ordnance, as was necessary for him to shew, because the condition of the bond is that he do and shall, during so long time as he shall continue to hold and exercise the said place or office which he now holds and exercises as aforesaid, or any other place or office in the said office of Treasurer and Paymaster of his Majesty's Ordnance, duly and faithfully pay and apply all such sum and sums of money as hath or have been or shall or may be received by him as Clerk as aforesaid, in such manner, &c. &c. In order to have made this a good rejoinder the Defendant should have alleged that the residue was received by *W. B. Ruddick*, not whilst he continued to hold and exercise the said place or office or any other place or office in the said office of Treasurer and Paymaster of his Majesty's Ordnance, but by virtue of another and different office or place, not being an office or place in the said office of Treasurer, &c. Not having done so, his rejoinder does not maintain his plea, and it is therefore undoubtedly bad. That objection disposes at once of all the rejoinders demurred to. I am of opinion that they are all for the same reason bad, and therefore there must be judgment for the Crown.

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GARROW, *Baron*, concurred.

Judgment for the Crown.

Tindal then applied for leave to amend, which was refused, because the demurrer had been argued.

END OF SITTINGS AFTER TRINITY TERM.

REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER
AND
EXCHEQUER CHAMBER.

MICHAELMAS TERM,
3 GEO. IV.

RICHARDSON v. HODGSON.

THE bail in this case were not allowed to justify, on account of their having been too generally described in the bail piece. Time was asked and given till a future day. The Plaintiff's Counsel applied for the costs of the opposition, as one of the terms of that indulgence; but

The Court refused to order costs of opposing the bail to be paid at present, reserving the consideration of the payment of the costs till the bail should next appear to justify; considering the looseness of description to have been the effect of mere inadvertence.

1822.

*Wednesday,
6th November.*

A too general description of bail, although a sufficient ground for opposing the justification, is not in itself enough to call upon the Court to fix the Defendant with the costs of the opposition at the time—but the consideration of costs will be reserved till the bail justify.

1823.

Friday,
8th November.

Motions for new trials of issues directed from the Equity side of the Court are not subject to the rule requiring such motions to be made within the first four days of the following Term.

Such applications may be made at any time during the succeeding Term, or the sittings after; but they should, in the first instance, be made before the Lord Chief Baron, sitting alone in Equity, if they arise out of causes pending before him.

PULLEY v. HILTON and Others.

ADAM mentioned to the Court, that a motion was intended to be made for a rule for a new trial of the issue, which had been directed in this tithe cause, in order to save to himself the right to apply, as the time within which, by the rule of the Court, motions of that description must necessarily be made, would expire, unless the Court should extend it.

Per Curiam.—The rule in these cases is, that all such motions arising out of causes in Equity, depending before the Chief Baron alone, should be made before him only, because he is in possession of the circumstances of the case, unless where a point of law, on the admissibility of evidence, or other legal difficulties, arise; in which case, the motion having been first mentioned to the Chief Baron, might probably be directed by him to be made before the whole Court, for his own satisfaction.

As to the time within which such application should be made, the limitation of the time for moving to the four first days of Term, adopted on the Plea side of the Court, does not apply to cases of trials of issues sent from the Equity side of the Court, because they are not within the reason of that rule. Such motions may be made at any time during the Term, or the sittings after.

1823.

FLETCHER v. WEBB.

Friday,
8th November.

PELL, Serjt., moved for a Rule to shew cause why the verdict which had been obtained by the Plaintiff in this case should not be set aside, and a nonsuit entered.

In an action on the case for maliciously holding the Plaintiff to bail, which was founded on the single fact of her having been arrested on mesne process at the suit of the Defendant, for money due from her, as administratrix of her husband, to the Defendant, as indorsee of two promissory notes made by the husband, no proof having been offered on the trial of malice express or implied, the Jury gave a verdict for the Plaintiff, with 5s. damages.

It was an action for *maliciously* holding the Plaintiff to bail, by causing her to be arrested on mesne process for 600*l.* due from her to the Defendant, as indorsee of two promissory notes made by the Plaintiff's husband who was dead, and to whom she was administratrix; and it was founded entirely on the circumstance of the Plaintiff having been sued in her representative character of administratrix, not the least proof of any malice express or implied having been given or offered on the trial, the Plaintiff relying wholly on the single fact of her not having been arrested, not being liable to be held to bail for a cause of action against her as administratrix. Upon that case the Jury had found a verdict for the Plaintiff, with 5*s.* damages.

Per Curiam.—We have considerable doubt whether there was not enough in the case, as proved, to shew implied malice, at least; for where a woman is held to bail under such circumstances, the Plaintiff knowing that she was liable in a representative character only, and proceeding

On motion to set aside the verdict and enter a nonsuit on the assumed defect in the Plaintiff's case, of the absence of evidence of malice, the Court were inclined to hold that such a case of implied malice had been made out as would support the verdict against that objection. The damages

being very small, however, they held it to be a case in which they ought not to interfere, and refused a rule to shew cause.

against

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FLETCHER
v.
WEBB.

against her in that character, it was such an injury done to her as to afford probable cause for imputing malice to the Plaintiff, in causing her to be arrested. Then the amount of the damages is very small, and the Defendant has nothing to complain of in that respect. We, therefore, consider this to be clearly a case in which we ought not to interfere to set aside the verdict of the Jury.

Rule refused.

Thursday,
14th November.

CROFT v. APPLETON.

A material amendment is not sufficient cause to discharge an order nisi to dismiss.

The course is to reply, and then get an order for leave to withdraw and amend.

The facts on which the application for that order is grounded must be verified by affidavit.

THE Defendant had obtained the usual order Nisi to dismiss for want of prosecution. The Plaintiff shewed, for cause, a material amendment, the addition of necessary parties. This was alledged by Counsel at the bar, and the Defendant asked time to amend, without replying, undertaking to amend within such time as the Court should limit. The case of *Dessaux v. Sheppard*, 27 July, 1791, in *Scac. MS.* was cited from *Fowler (a)*, to shew that this course was conformable with the practice; but

Per Curiam.—The Plaintiff ought to have filed an affidavit of the fact alleged by his Counsel. The Plaintiff must reply, and then he may apply to the Court to withdraw and amend.

(a) Vol. II. p. 28.

1832.

HARTWRIGHT v. BADHAM.

Friday,
15th November.

THE Plaintiff in this action declared in trespass for breaking and entering a certain close called the *Withy Beds*. The Defendant pleaded the general issue, and pleas, by way of justification, 1st, that the Defendant was seised of a certain close adjoining, called *Raven's Nest Copy*, and that she and all, &c., from time immemorial, have had and used a certain way for themselves, and servants, and tenants, occupiers of the said close called *Raven's Nest Copy*, to pass and re-pass with carts, &c. from a certain common highway into, through, over, and along the said close called the *Withy Beds*, unto the said close called *Raven's Nest Copy*, for the tillage, occupation, &c. thereof: 2dly, a right of way by grant: and 3dly, a right of way by prescription, in respect of another close of the Defendant's, called the *Long Lengths*, over the *locus in quo*. The Plaintiff, by his replication, traversed the pleas pleaded by way of justification, and tendered issues, in which the Defendant joined; and as to the special pleas, the Plaintiff now assigned. The new assignment the Defendant also traversed, and issue was joined thereupon.

The Court will not permit affidavits to be used on a motion for a new trial which tend to impeach the integrity of the Jury.

Although surprise be a good ground for a motion for a new trial; and affidavits may be used to establish that ground, they must be conclusive; and the facts in respect of which the evidence creating the surprise was given must be such as that the verdict may be mainly attributable to their effect upon the decision of the cause.

If there appears on the whole evidence enough to sustain the verdict found, independently of the facts brought into doubt, the Court will not interfere and order a new trial, although the right be bound.

The cause was tried before Mr. Baron Garrow, at the last *Lent Assizes* for *Hereford*, when the Jury found a verdict for the Plaintiff, negating the right of way.

Taunton, in *Easter Term*, applied for a Rule to shew

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HARTWRIGHT

v.

BADHAM.

shew cause why the verdict should not be set aside, and why there should not be a new trial.

In support of that application several affidavits were tendered, which, in substance, negatived a material fact sworn to by the Plaintiff's witnesses on the trial, which was, that *John Rogers*, a former occupier of the Defendant's close, had asked and obtained permission from the occupier of the Plaintiff's close, to take his cattle over the *Withy Bank*, and that the former had agreed to do two days' harvest work for the latter for that permission; whereas the affidavits stated that *John Rogers* never did occupy the *Raven's Nest Copy*. They also imputed to the Foreman of the Jury the exercise of undue influence over the rest of the Jury, in favour of the Plaintiff, under whom he and others of the Jury were stated to hold lands; stating that he had, after the trial, spoken of the verdict in a manner which proved that it had been the effect rather of improper bias than of due consideration of the merits of the cause. On those affidavits it was submitted that there ought to be a new trial; for that the evidence of acknowledgment of the Plaintiff's right by *John Rogers*, had been a surprise on the Defendant, who was not aware, at the trial, that *John Rogers* had ever occupied the close, in respect of which the right of way had been claimed; and it now turned out to be not the fact; the witness having been at least mistaken in the evidence which he gave on the trial, in that particular.

[It was also urged, that the misconduct of the
Jury

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 HARTWRIGHT
 v.
 BADHAM.

Jury was another ground on which this application was well founded; but the introduction of that matter in the affidavits being strongly censured by Mr. Baron *Wood*, the Court, on that point, determined, at once, that such parts of the affidavits as imputed misconduct to the Jury could not be received; for that it would be a dangerous precedent, and pregnant with infinite mischief, if they were to allow such matters, stated in affidavits, to be urged in support of applications for new trials. The affidavits which had been filed were therefore rejected, as being impertinent in that respect; but the Court directed that they should be re-modelled so as to omit those charges, and present such a statement of facts only as was necessary to shew the contradiction of the testimony of the witness.]

Another objection was taken to the verdict, on the ground of a misdirection on the part of the learned Judge who tried the cause, in having told the Jury, that, in this case, the second plea by way of justification, whereby it was meant to raise the presumption of a grant, was out of the question, as the evidence which had been given did not establish that plea, as there was no proof of any user of the road claimed before the time of the occupation of the *Raven's Nest Copy* by *Thomas Rogers*; and during his occupation he was in possession, also, of the *Withy Beds*; whereas they submitted that there was sufficient evidence to raise such a presumption; it not being necessary for that purpose to shew immemorial user.

The

1833.


 HARTWRIGHT
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The Rule was drawn up on the 27th of *April*, to shew cause on the 7th of *May*, with liberty for the Defendant to file further affidavits in the mean time in support of it, on or before the 4th (a).

Mr. Baron GARROW now reported the evidence on both sides, as laid before the Jury on the trial; the general result of which was, there was no road through the *locus in quo*, and that it had been proved, on the part of the Plaintiff, that certain acts had been done from time to time by the former occupiers of the Plaintiff's close, quite incompatible with the right of way claimed by the Defendant; the strongest of which were, that the gateway into the close through which the way was said to be, was so narrow that a tree was once torn away by a cart attempting to pass through—that that gateway had been afterwards moved by the owner one hundred yards further up in the field, and the place where the gate had been hung strongly fenced; and the effect of removing the gateway would have taken the way claimed more off the common road, and further over the close, making it more inconvenient to the Defendant, and even more injurious to the Plaintiff. The gate was afterwards moved again twice, ultimately to its original place. It was also sworn by one witness,

(a) There were altogether fourteen affidavits filed on the part of the Defendant; amongst which was one by the Defendant herself. Eight were filed before the motion was made, and six more after. Besides what has been already stated to have been their contents, they asserted generally that the way in question had been immemorially used by the Defendant's predecessors.

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Richard Clarke, that *John Rogers* had formerly occupied the Defendant's close, *Raven's Nest Copy*—that he, *Rogers*, had been told by the then tenant, on one occasion of driving a cow through the *Withy Beds*, that he was trespassing, and that he then asked leave and obtained it, in consideration of his giving the occupier of the *Withy Beds* two days' work in the harvest.

On the part of the Defendant the evidence consisted principally of acts of user. The whole case was left to the Jury, who found for the Plaintiff. His Lordship stated, that, according to his recollection, he had directed the Jury to find according to the conclusion to be drawn from the evidence, as to whether the acts of user proved were referrible to permission and indulgence or negligence, on the one hand, or to the exercise of an adverse right on the other.

Russell and *Cross* shewed cause (a). They stated, that it having been the desire of the Plaintiff to try the real question between the parties fairly, the new assignment had been given up on the trial for that purpose, in order that the case might go at once, as it did, to the Jury, who

(a) Affidavits were also filed on the part of the Plaintiff, in answer to those on that of the Defendant. *Richard Clarke* was one of the deponents, and he repeated the assertion as to the possession of *John Rogers*. There were nine other deponents, but neither of them stated that *John Rogers* had occupied the *Withy Beds*. The affidavits went to shew that the Defendant's road lay over another person's close, which had formerly belonged to the Defendant and those under whom she claimed.

found

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found a verdict, without hesitation, for the Plaintiff. It being left entirely to the Jury, they urged that the verdict ought not now to be disturbed, particularly on affidavits filed after the motion for the Rule, which was not only an unusual course of trying a question of right of way, but was more particularly objectionable when the extraordinary nature of the affidavits and the situation of the deponents were considered. The Defendant herself, who could not have been a competent witness on the trial, had been allowed to make an affidavit; and those of the other deponents, as they might have been examined, ought not to be received, because they should have been examined at the trial. The statements in the affidavits might have been given in evidence on the trial in the proper and regular manner; yet not one of the questions put to the witnesses who had been examined had any reference to such of the facts in the affidavits as could alone be now considered material, particularly with respect to the occupation of *Raven's Nest* by *John Rogers*: but even admitting, for an instant, that the witness had been mistaken in that fact, it could not be contended that wherever it might be shewn, by affidavits, that a witness had mis-stated a single fact, a new trial ought to be granted.

On the evidence of user, which the Defendant had given, they observed that it had been agreed that, as during the occupation of *Thomas Rogers*, who was in possession for thirty-five years, he held at the same time, for a great proportion of that period, the *Withy Bed* close also, his user of the road

road during such unity of possession would amount to nothing as proof of the right being in the occupiers of the *Raven's Nest Copy*.

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[It was not admitted that that had been agreed to, except to a limited extent, the united possession having been not continued but occasional only.]

The user (it was insisted), such as it was, was necessarily confined to the period of time which had elapsed since the occupation of *Thomas Rogers*, who occupied the closes for thirty-five years, and had ceased to occupy them twenty-five years ago; because during the former time he occupied both; and before the commencement of that occupation human memory could not go back. Under the circumstances, therefore, they submitted, that even without the evidence of the witness whose testimony was attempted to be set aside, there was sufficient to obtain a verdict, and certainly enough to support one: and for that reason there ought not to be a new trial.

On the ground of the supposed misdirection, they submitted that there had, in truth, been none; or that even if there had, it had been acquiesced in, by being suffered to pass unnoticed at the time.

Taunton, Puller, and *Ludlow*, in support of the Rule, contended that the surprise upon the Plaintiff,

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tiff, at the trial, arising from the unexpected and unfounded testimony of *Clarke*, as to a fact so important as that which was stated by him, and which was certainly the strongest point in the Plaintiff's case, was sufficient ground for sending the cause down to another investigation, when it might be laid before a Jury without that material fact, which ought not to have made part of the Plaintiff's case. That that fact was not true, they insisted was abundantly proved by the testimony of the nine several persons who now contradicted the fact of *John Rogers's* occupation of the *Raven's Nest Close*; and therefore, he being a stranger, his request of, and the leave given to him to pass, could not be evidence against the right claimed by the tenant of that close; and that was a piece of evidence in the cause which could not have been anticipated by those who had the conduct of the Defendant's case, and therefore was, in all respects, a surprise: for there could have been no preparation made at the trial to enable the Defendant to meet it.

[To a question put by the Lord Chief Baron, it was answered, that the Deponents had not been examined at the trial; which was attributed to the Defendant not being aware of the evidence: but the Court observed, that they considered it extraordinary that no one should have been present amongst the witnesses, at the trial, who could have contradicted that, and that no attempt should have been made to have done so.]

They

They urged, that without the means at hand of repelling a statement so conclusive in respect of a claim of private way appurtenant to a tenement, as the fact of the admission of *John Rogers* would be if he had been the occupier, it would be hard, in a case where the right was bound by a verdict, that a Defendant should be deprived of that right by evidence coming on him by surprise, when he had the means, as afterwards proved, of contradicting the testimony, and would have done so; could he have been aware of it, or could he have anticipated it.

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On the evidence of the acts by the owners of the *Withy Beds* close, said to be adverse to the proof of user of the right which was given by the Defendant, they contended that the strongest instance was the removal of the gate; yet that, they urged, was not conclusive, unless the way had been barred, and the Defendant shut out: for the mere removal of the entrance, and appointing a new gateway, without excluding the claimant, would not destroy the prescription on which the right was founded—the user of the new way would be evidence of the continuance of a right to pass over the old one; and the change of road would be by no means proof of an adverse opposition to the right, as decided by the cases.

[It was suggested here that the affidavits of the Defendant furnished evidence of the removal of the gate being adverse, as against her, she having stated, that when, on one occasion, an occupier of the

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the *Withy Bede* had put a fence where the gate first stood, her husband had thrown it down.]

Whether, in point of fact, the change of position of the gate had been more or less inconvenient, could only be ascertained by a knowledge of the local circumstances from inspection. At all events there was nothing in that, even if it were so, which might not be attributable to personal accommodation; and certainly it was not an adverse interruption or prohibition of the long exercise of the right, whether it were by right or by wrong. They therefore submitted that the justice of the case could not be attained in this cause without a new trial.

RICHARDS, Lord Chief Baron.—The single question in this case is, whether we shall direct a new trial; and that question will depend on whether the verdict which has been obtained be supported by the evidence which was given on the trial or not. If it were not, we certainly ought to send the cause down to be tried again. There was much contradiction in the evidence given on both sides, no doubt; but that must have been well considered by the Jury, who were the most proper persons to decide between the parties in that respect, for it was their peculiar province to do so. The question principally turns on the evidence given by *Clarke*. The fact spoken to by him was undoubtedly most important. That, however, is now contradicted by these affidavits. I repeat what I before observed during the argument,

ment, that I do not feel myself enabled to say that *Clarke* has sworn untruly, because he has been contradicted in this manner to a certain extent. The affidavits, at the same time, would have the effect of unsettling the matter sworn to on the trial, if the contradiction were sufficient, and then they must undoubtedly prevail so far; but I do not consider them so sufficient as to have that effect.

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Richards, B.

The next question is, whether there has been any surprise; and that question is brought before us in certainly a very odd shape, as intended to shew surprise. The fact stated by *Clarke* was, that a former occupier asked permission to pass over the place where the right is claimed. It was, indeed, a most important piece of evidence, yet I am astonished that it should have been suffered to be given without any attempt to contradict it: the means of contradiction one cannot conceive not to have been in the power or knowledge of the Attorney. Counsel might not have been prepared, but it ought not to have been a surprise upon the Attorney. If, however, there had really been any mistake about a fact so material, or if it had been clearly shewn to be so, I should have wished that there should be a further inquiry to satisfy the complete justice of the case. But notwithstanding that desire, I do not think this a case which it is necessary to send again to the Jury; for the Courts of Law have now adopted the rule which has long been ob-

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served in the House of Lords and in Courts of Equity, that a single miscarriage in the testimony on the part of the succeeding party, is not sufficient to induce them to order a new trial on that ground, if there be other evidence. There is, however, a ground on which the verdict may be sustained, which is not subject to the objection of surprise, nor is there any suspicion of it suggested there. That is, the removal of the gate on several occasions, and to a distance of one hundred yards and more; and that, by the removal, it was placed in such a situation as to have necessarily been productive of great inconvenience to the Defendant; for the length of way was not only increased, but the Defendant was deprived of the advantage of having to pass over the turnpike road, and had to pass over the Plaintiff's ground for a considerable way. The facts of the whole case were left to the Jury; and I think it would have been singular, if, on the evidence, the Jury had found a verdict the other way; but if they had, I should not have been disposed to say I would not suffer it to stand; for still all this may have been done, certainly without any assertion of right or intention to do so, and it may have been consistent with the right claimed. I am of opinion, however, that the Defendant should have gone further, and have shewn some foundation for the claim.

We have then the fact of the occupier's shutting up the old way. These are all distinct and strong facts in proof of an assertion of right; and the acts
were

were not complained of, although certainly very inconsistent with the right of way claimed by the Defendant.

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As to the evidence of *Clarke*, therefore, on the overthrow of whose testimony so much of the Defendant's objection to the verdict depends, I think, that without his evidence the circumstance of the removal of the gate would alone have been sufficient, in this case, to have enabled the Jury to come to the same conclusion; and therefore I think that their verdict is right.

GRAHAM, *Baron*.—The only circumstance creating any doubt in my mind, is that of there having been suspicion thrown on the evidence of *Clarke*, to whom mistake, in a material point of the evidence, has been imputed. I can not, however, give to these affidavits the strong effect of annulling his testimony, believed, as it was, by the Jury, even on the ground of mistake; still less can I do so on the ground of its being false. He certainly may have been speaking, in point of fact, of *Thomas Rogers*, instead of *John*; and if there were a mistake, it seems most probable that it was really, after all, in the name; ascribing a conversation as having taken place with *John*, which, in fact, was on the part of *Thomas*. But I proceed on this principle, that it would be a most dangerous precedent, if, in every case where one witness on either side may be discovered, after verdict, to have tripped in a single instance, like the present, for

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instance, making a similar mistake as to the fact of which he has spoken, there should be a new trial on that ground. It would be, in effect, granting a new trial to try the credit of witnesses. Admitting that he was mistaken altogether, and that his evidence being withdrawn would weaken the Plaintiff's case, still I am of opinion that there was evidence enough in this action to warrant the finding of the Jury without his testimony, and that the Jury would have done right in returning the same verdict.

Then I am of opinion, also, that to support the Defendant's case of user, the evidence was too weak. Great part of the time was taken off by the fact of the Defendant's predecessor being the occupier of both the closes; twenty-five years, therefore, is the utmost length of time during which the user has been proved, even if it were stronger than it is. The natural suggestion is, that the successor had both closes, also, for some time, or at least that he was supposed to have the right even after the occupation of the predecessor had ceased; and it was natural that a new tenant might be tempted to use the road which had been used by the preceding occupier, not knowing the real foundation of the previous user. The evidence of interruption in the exercise of that right is certainly contradictory; but there were many occasions proved, without doubt, of the Defendant and her predecessors being forced to go by a circuitous way, and the argument is throughout

prima

prima facie against the Defendant. The evidence of an immemorial right is, however, much weaker than the evidence of adverse interruption.

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It was said the Judge's direction to the Jury, on the plea of grant, was wrong; yet I think the Counsel felt that it was necessary to prove it, if not immemorial, much further back than their proof amounted to, in order to make a case of prescription that would stand; and *Thomas Rogers's* possession of both closes was very much against the practicability of any such proof.

The question for the Jury, therefore, was simply whether the user was exercised by right; or by the permission or negligence of the owner of the Plaintiff's close; and if the Jury thought it permissive, that would go to the plea of grant, as well as to that of prescription. Their verdict, therefore, equally impugns both. There is also another reason why it is impossible, on the evidence, to sustain the plea of grant; because, in a grant, the way must necessarily have been specified: and this way could not have been the subject of grant, because it could not have been a specific way if the owner of the close could of right remove the gateway at his pleasure; and more particularly, if, to the inconvenience of the tenant. Any removal would be inconsistent with such a right so founded on specific grant, more especially such a removal as casts on the party claiming it a necessity to adopt a road over which he must be compelled to pioneer his way.

Notwithstanding,

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Notwithstanding, therefore, some little difficulty which I certainly have had, on the ground of the doubt thrown on the testimony of *Clarke*, which, however, I do not consider sufficient to prevent my concurrence with the opinion which has been delivered by my Lord Chief Baron, I have no hesitation in saying, that I think there certainly ought not to be a new trial in this case.

[Mr. *Baron Wood* was not present, in consequence of indisposition.]

GARROW, *Baron*.—I have always myself taken the same view of this case which has been adopted by my Brothers. In the absence of my Brother *Wood* I shall only say, that I concur.

I think it right to observe, however, that this application for a new trial would never have been made, or the objections on which the argument has proceeded, if it had not been that there were some hopes excited that a new trial might be obtained on the ground of the attempted impeachment of the conduct of the Jury, by the affidavits which were made, stating some of them to be tenants of a person who was, for that reason, supposed to possess some influence over them. I am quite sure it would not otherwise have been thought of, merely on the objections which have been taken to the evidence.

Per Curiam.

Rule refused.

EDWARDS

EDWARDS *v.* MORGAN and Wife and Others.
MORGAN and Wife and Others *v.* Edwards and
Another.

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Saturday,
16th November.

BARBER moved pursuant to notice given on the 1st day of this Term, on behalf of the Defendants in the first mentioned cause, that publication therein might stand enlarged until the coming in of the answers of the Defendants in the other cause, which was a cross cause, or until the first day of Hilary Term (a).

The Court will enlarge publication after answer to original Bill, till the answers in a cross cause come in; but they will require an affidavit verifying the facts stated in the cross Bill.

The Court, on that occasion, refused the motion because the Defendants produced no affidavit, and required that an affidavit should be filed, verifying the facts stated in the cross bill, that affidavit having been procured, the motion was now renewed. The affidavit stated as facts the matters in the cross bill, which was filed for a discovery of assets, and that the deponents believed the answer to the cross bill would furnish them with a good defence to the original bill.

Sclater opposed the application on the ground of delay: and he cited the case of *Dalton v. Carr* (b),

(a) The original Bill was filed in Hilary Term 1818. The answer of *Morgan and Wife* 20th May, 1818. Bill amended 11th Feb. 1819—14th May, 1819, answer to amended Bill, filed. Replication Easter Term, 1822. This Cross Bill was filed, as appeared by the certificate of Plaintiff's clerk in Court, as of this present Michaelmas Term.

(b) 16 Ves. 93.

where

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where a similar motion, made after answer to the original bill, had been refused. He also submitted that the affidavit was insufficient; but

The Court determined that the motion was proper in this stage of the cause, and well supported by the affidavit. It was therefore

Granted.

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Saturday,
16th November.

PIPPIN and Wife v. SHEPPARD.

[Demurrer.]

It is not a ground of demurrer to a declaration in an action on the case by a man and his wife against a surgeon for an injury to the wife by reason of the Defendant's improper and unskilful treatment, that it is not stated—in the averment that the Defendant was retained and employed as surgeon for reward to be to him paid—by whom he was so retained, or by whom he was to be paid.

THIS declaration (which was without venue) stated that the Defendant before, and at the time of committing of the grievances, &c. followed and carried on the art, mystery, and occupation of a surgeon—that Defendant, afterwards, &c. *at Bristol aforesaid, was retained and employed as such surgeon for a certain reasonable reward to be to him therefore paid*, to treat, attend to, and cure divers grievous hurts, cuts, &c. just before then by the wife had and received: and the said Defendant *then and there* ENTERED UPON the treatment and cure of her; yet Defendant afterwards, to wit, on the day and year aforesaid, &c. and other days be-

Nor that it is not stated that the Defendant undertook, &c. properly or skilfully to conduct himself in and about, &c.

It is sufficient to aver that the Defendant *was retained as a surgeon and entered upon the cure*.

Nor is it matter of demurrer that there is no venue laid, if a place be stated in the count.

tween

tween that day and the day of exhibiting this bill at *Bristol* aforesaid, so carelessly, negligently, improperly and unskilfully, conducted himself in that behalf, and then and there so carelessly, &c. applied his care and treatment in and upon a certain wound, &c. of the said wife, that by means thereof the said wound became and was grievously aggravated and made worse, and was thereby *then and there* made and rendered violently and dreadfully inflamed, &c. to the danger of the wife, and that her life was greatly despaired of, and that by means thereof she suffered great pain, &c. and was forced to submit to painful surgical operations in and about the treatment of the said wound by other and more skilful surgeons, who were thereupon necessarily retained to attend upon her, to wit at *Bristol* aforesaid.

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The Defendant demurred specially for the following causes:—for that it is not stated or alledged in or by the said declaration, nor does it appear therefrom *by whom the Defendant was retained and employed as such surgeon* as therein mentioned, to treat, attend to, or cure the hurts, &c. or that the *Plaintiffs or either of them retained*, &c. or that Defendant was so retained at their or either of their special instance or request: and also for that it is not alledged or stated in or by the said declaration that *it was the duty of the Defendant or that he undertook or engaged properly or skilfully to conduct himself in and about the treatment or cure of the said hurts*, &c. nor *by whom* the said reasonable reward in the said declaration mentioned was

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to be paid to the said Defendant. And also, for that the said Plaintiffs have not alledged or stated in or by the said declaration *any sufficient ground or cause of action against the Defendant*; and also, for that *no place of venue* is stated where the said Defendant is supposed to have so negligently, improperly and unskilfully conducted himself; and also, for that the said declaration is in other respects uncertain, defective, and informal, &c. The Plaintiffs joined in demurrer, and it was now supported by

Bayly, who (giving up the objection to the want of venue) contended that the declaration, though in form complaining of a tort, being in substance framed and founded on a contract, was objectionable in not setting out the terms of the contract, and in that respect the principal ground of this demurrer was the not stating by whom the Defendant had been retained and employed to conduct the cure, which was the subject-matter of the contract.

The object of the rule of pleading, requiring the terms of a contract to be set out, is, that the Defendant may know the nature and extent of the demand, and be enabled to make an effectual defence, which, unless he be apprized of the precise charge, he cannot do. It was strongly urged that this declaration, being framed in tort, did not therefore preclude the Defendant from taking advantage of any defects in it, which would have been ground of objection to it, if it had been in form

form assumpsit, or founded on contract: *Buddle v. Willson*(a), *Powell v. Layton*(b).

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Another mischief arising from permitting such loose pleading (it was submitted) would be that the Defendant, after a recovery against him in an action on such a declaration might still be sued upon a liability to other persons; as, for instance, if one having an annuity depending on the life of this person, on whose recovery he would, therefore, have an interest, and had employed and sent the surgeon to attend her, he also might have an action against him for unskilful treatment, whereby her death had been occasioned or accelerated. If this declaration should be held good, it would become a precedent and the common form, whereas there is no such form to be found in pleading, and would be highly injurious to Defendants to be subjected to such a mode of declaring, for which there was as yet no precedent or authority.

Carter, contra, insisted that the declaration was sufficient, and that there was no ground for the demurrer. So far from this declaration being without precedent or authority, it would be found to be more full in its statements than the old law required. In the *Reg. Brev.* 110 there is an old writ (which was always as full as the declaration), the form of which shews that it is unnecessary to mention in the declaration more than enough to

(a) 6 Term Rep. 369.

(b) 2 New Rep. 365. See *Bretherton v. Wood*, ante. Vol. 9. 408.

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shew that the Plaintiff had sustained an injury by the misconduct of the Defendant.

In the case of *Coggs v. Bernard*(a), principles of pleading are recognized on which this declaration may be supported. An undertaking to do a thing, even without consideration, creates a liability for negligence and want of due care. The undertaking there spoken of, also, means, not only an assumpsit, or a future promise, but any *actual* entry upon the thing, by the party, and taking upon himself the trust, as Lord *Holt* says, in that case, and he adds, "If a man will do that, and miscarries in the performance of the trust, an action will lie against him for that, though nobody could have compelled him to do the thing"; and he puts the case of the carpenter undertaking to build a house by a given time, where, although he should not do so, an action would not lie, yet for building it unskilfully it would.

In the same case, the form of the declaration is adverted to by Mr. Justice *Powell*, who relies on the form of the writs in the register which have been cited. He says the authorities of the pipe of wine, and the cure of the horse, are in point, and there can be no answer given them but that they are writs *which are framed short*. But (he observes) a writ upon the case must mention every thing that is material in the case, and nothing is to be added to it in the count but the time, and such other circumstances.

(a) 2 Lord Raym. 909.

The action, in the present instance, is not brought nor founded on the contract, but on the damage done to the individual by the negligence, improper treatment and unskilfulness of the Defendant, who had undertaken, or (as Lord *Holt* translates the word *assumpsit*, and as the expression is in this declaration) had entered upon the cure without any allusion to any contract between any parties. The Plaintiffs seek damages for the injury done to, and the suffering endured by the wife, to which they, and they only, will be entitled, if they prove their declaration, without reference to any other person who may have retained and employed the surgeon, and who, whatever right such person might have to sue on the contract, have also a right to proceed at law for the special damage, which is wholly distinct from, and independent of any existing contract, and is founded on a different cause of action. And that is the answer to the supposed cases which have been put of third persons having also a possible right to sue the Defendant on the contract. The right to sue for damages for personal grievance is personal.

In respect of persons in general, who profess skill in particular matters, and perhaps in the case of surgeons especially, there is a duty cast on them by the law to treat the objects of their art properly, and with, at least, an ordinary degree of skilfulness, at whosoever instance they may be employed, and by whomever they are to be remunerated.

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nerated. In *Seare v. Prentice* (a) it was held that an action on the case lies against a surgeon for ignorance and want of skill, as well as for negligence and carelessness. He therefore submitted that the declaration was sufficient.


Bayly, in reply, contended that the word "assumpsit" used in the writs cited from the Register, and the words "took upon himself" in the declaration, in *Coggs v. Barnard* (b), necessarily imported an undertaking to and a contract with somebody, and that must be taken to be with the Plaintiff, shewing, therefore, by whom the Defendant was employed, which distinguished those cases from this, where the declaration merely stated that the Defendant entered upon the cure without stating with whom he contracted for that purpose, sufficient information having been furnished in that respect in the cases cited. Such actions in case, founded on contract, have been permitted to be turned into torts in the form of the declaration, for the sake of convenience, although the propriety of it has, in many cases, been doubted, yet that has never been considered as dispensing with the necessity of shewing the material terms of the contract, which is the basis of the action.

All that was determined in *Coggs v. Barnard* was, that an action would lie on an *undertaking* to do a thing if it were ill-done, although there were

(a) 8 East. Rep. 352.

(b) 2 Ld. Raym. 999.

no consideration or *reward* stipulated for: but that case does not determine that an action would lie if there had been no undertaking; or that, in declaring for an injury sustained in consequence of a misfeasance, it is unnecessary to aver in the declaration in an action for damages for doing it ill, at least a general undertaking to do the thing.

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The single question is, whether this declaration, which is for a tort in form, but founded, in substance, on a contract, can be considered sufficient, when it does not state any one of the terms of the contract, which is the gist of the Plaintiff's cause of action.

RICHARDS, *Lord Chief Baron*. I am really at a loss to know how any declaration should be framed in this case so as to be right, if this be wrong. The Defendant, being a surgeon, undertakes to the public, to cure wounds and other ailments of the human system, and professes himself ready to be employed by any one for that purpose. The declaration states that he was as a surgeon employed for a reasonable reward, to attend and cure this patient, that he entered on the treatment, &c. (stating the declaration). It is, therefore, I think, sufficiently stated that the Defendant undertook the cure. Then negligence and improper treatment are charged, and the injurious effects of such misconduct are averred. The question then is, to whom was the injury done? If a stranger had sent the Defendant as a surgeon to cure this woman, undertaking to pay him for his attendance,

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ance, he would not be entitled to recover or sue for damage and injury done to her, in consequence of the surgeon's negligence and want of skill. From the necessity of the thing, the only person who can properly sustain an action for damages, for an injury done to the person of the patient, is the patient himself, for damages could not be given on that account to any other person, although the surgeon may have been retained and employed by him to undertake the cure. The party employing the surgeon can have nothing to do with this action: I am, therefore, of opinion that the demurrer cannot be sustained, and that there must be judgment for the Plaintiff.

GRAHAM, *Baron*. There can be no difficulty in a case of this sort to understand to what this declaration really applies. The objection must necessarily be founded on the declaration being in its present shape equivocal. I am clearly of opinion that it is not. It is clear that it means nothing more than to charge that damage has accrued to the Plaintiff's wife, from the injury sustained by the misconduct of the Defendant, in taking on himself the cure of her. The Plaintiffs are the only persons who could recover damages, or be entitled to demand them, for the injury complained of. That is the true test by which this question must be tried. The case of *Coggs v. Barnard* goes to shew that, in the case of a contract to deliver goods safely, it is sufficient to state that the party undertook to do so, and did not. In this case it appears to me that there is a sufficient allegation that

that the Defendant undertook the cure, and that by his unskilful conduct the Plaintiff's wife suffered an injury, and that is enough to support the action. Whatever cause of action other persons besides may happen to have, is therefore wholly out of the question.

1832.

 PIPPIN and
 Wife
 v.
 SHEPPARD.

[Mr. *Baron Wood* was absent.]

GARROW, *Baron*. It would be of most mischievous consequence if this declaration could not be sustained. In the practice of surgery particularly, the public are exposed to great risks from the number of ignorant persons professing a knowledge of the art, without the least pretensions to the necessary qualifications, and they often inflict very serious injury on those who are so unfortunate as to fall into their hands. To hold the contrary, would be to leave such persons in a remedyless state. In cases of the most brutal inattention and neglect, patients would be precluded frequently from seeking damages by course of law, if it were necessary, to enable them to recover, that there should have been a previous retainer, on their part, of the person professing to be able to cure them. In all cases of surgeons retained by any of the public establishments, it would happen that the patient would be without redress, for it could hardly be expected that the governor of an infirmary should bring an action against the surgeon, employed by them to attend the child of poor parents who may have suffered from his negligence and inattention; and are they to be

1822.

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without remedy because they cannot get the names of the 500 persons by whom the surgeon was employed, to insert in their declaration? If we were to hold that such an averment were necessary, it would be holding out an encouragement to neglect and carelessness, by depriving parties of all remedy, in consequence of making it impossible that a declaration should be so framed as to be free from the objections raised by this demurrer.

Per curiam, There must be

Judgment for the Plaintiff.

Bayly asked permission to be allowed to withdraw the demurrer and plead the general issue, but the Court refused it, saying that it could not in any case be granted after argument.

1822.

Friday,
22d November.

FLINDELL v. FAIRMAN.

Where a prisoner was charged in execution, in Trinity Term, for 105*l.* instead of 100*l.* 5*s.* in consequence of the sum being wrongly stated in the judgment roll, and the mistake being preserved in the subsequent proceedings, the Court, in the following Term, granted a rule to shew cause why the judgment roll and *committitur* should not be altered according to the facts appearing by the *postea* and Master's *allocatur*, which rule they made absolute on cause shewn, upon payment of the costs of the amendment, without the costs of the application.

PRICE had obtained a rule calling on the Defendant to shew cause why the Judgment Roll, in this cause, should not be amended by altering the sum of 105*l.* to 100*l.* 5*s.*; and why the rule whereby the Defendant was committed to the custody of the

They, at the same time, discharged, *with costs*, a rule obtained, on the ground of the mistake, for discharging the prisoner.

warden

warden of the Fleet, should not also be amended by a corresponding alteration.

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FAIRMAN.

The affidavit on which the application was made stated, that the Plaintiff, in this cause, having obtained a verdict for 26*l.* at the last Spring Assizes, final judgment was signed in last Easter Term for 100*l.* 5*s.*—the costs having been taxed at 74*l.* 5*s.* That the Defendant having surrendered in discharge of his bail, it became necessary to charge the Defendant in execution in Trinity Term last—that the Clerk who entered up final judgment, entered it up by mistake for 100*l.* 5*s.*; and that the Clerk who made out the writ of habeas corpus for bringing up the Defendant, to be charged in execution, inserted therein the sum of 105*l.* being misled by the mistake in the Judgment Roll; that, on the 26th of June last, the Defendant was brought up to be charged in execution, when he resisted the motion, by Counsel, on the ground that the damages recovered were 100*l.* 5*s.* and not 105*l.*; but the Court referring to the Judgment Roll remanded the Defendant charged in execution for the sum of 105*l.*

The affidavit further stated that the Plaintiff's Attorney, having discovered the mistake in the course of the same day, he left with the Defendant, at the Fleet Prison, notice in writing, that on payment of the sum of 100*l.* 5*s.* the deponent was ready to give him a discharge; and that he left another notice with the Warden of the Fleet, apprising him that the Defendant was to be discharged on his

FF 2

paying

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FLINDELL
v.
FAIRMAN.

paying him that sum, and that the Defendant was to be considered as charged in execution for that sum only.

A rule had also been obtained by Sir *Wm. Owen* (founded on the same mistake), requiring the Plaintiff to shew cause why the Defendant should not be discharged out of custody as to this action, "he having been, as appears by the Judgment Roll, in this cause wrongfully charged in execution;" and that the Plaintiff should produce, on the hearing of the motion, the *postea* with the Master's *allocatur*, shewing the amount of damages and taxed costs in the action.

The rules now came on together to be disposed of at once.

Price, for the Plaintiff, submitted that the amendment was practicable, by reference to the verdict and Master's *allocatur*, and such as ought to be permitted, for that it could work no injury or injustice, and was justified by precedent and authority—citing *Hardy v. Cathcart*(a), where the Court made a Rule absolute, after argument, on cause shewn, for making the transcript of the record conformable with the record of a judgment altered at the same time, and by the same rule, in the material respect of remitting the damages which had been found by the Jury in a case where they were not justified in giving damages—and he

(a) 1 Marsh, 180. and see Tidd's Practice, 747.

adverted to *Roll's* Abr. Tit. Amend. *passim*. If the amendment were not permitted, on the other hand, he urged that the Plaintiff would lose the fruits of a regular judgment upon a verdict obtained by him in consequence of a mere clerical misprision.

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v.
FAIRMAN.

Sir *W. Owen*, for the Defendant, insisted that this application could not be granted, for that it would be inconsistent with the liberty of the subject to make the Rule absolute—and that it might operate to deprive the Defendant of his writ of error, and raise difficulties in his case in many respects. This hardship might ensue: if a Defendant were (as in this case) charged in execution on the last day of Trinity Term, a mistake of this nature would have the effect of keeping the Defendant in prison during the whole long vacation, which might be done maliciously; and if the Plaintiff were allowed to amend, the Defendant would be deprived of all remedy or means of redress. He urged that the mistake in this instance, was not one originating with the Court or any of its officers, but that it arose from the mere culpable negligence of the Attorney.

He cited the cases of *Baxter v. Parnell*, and *Topping v. Ryan*(a), to shew that what was asked by one rule could not be done, and that the other ought to be made absolute.

(a) 1 Term Rep. 227. and 1 Tidd's Practice, 371. and *passim* under same head.

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In reply, it was urged that the facts stated in the affidavits, furnished an answer to the arguments pressed in shewing cause against the Plaintiff's rule, and if so, that being made absolute would dispose of that which had been obtained by the Defendant.

RICHARDS, *Lord Chief Baron*. This really seems to me to be a very clear case [stating the facts and the error in the roll]. It is quite clear that the sum was wrong; there was certainly a mistake in the amount, and such a plain mistake as furnishes a clear ground for amending the Judgment Roll, by the verdict and the Master's *allocatur*. In a case of this sort it would, indeed, be a most extraordinary thing if we were not allowed to make such an amendment as that proposed. I am clearly of opinion that we have a discretionary power to permit the alteration required to be made, and under these circumstances, this is unquestionably a proper occasion for the exercise of it. The Defendant had full notice that the sum for which he was charged in execution was a mistake, and he was apprized in the course of the same day, and as soon as it was discovered, that he would be liberated immediately, on payment of the true sum for which he was actually liable; notice was also given to the Warden of the Fleet Prison, that the Defendant was to be detained for that sum only, and authority was given to discharge him on paying it. Nothing could be more proper than the conduct of Mr. *Darke* throughout, who did all he could

could to correct the error, and as promptly as possible.

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 v.
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Richards, C. B.

The opposition which has been made to this application rests on no reasonable grounds whatever, and I consider it very improper. For that reason, although, in general, the Court would give the Defendant the costs of such a motion, I have no inclination to do so in this particular case.

As to the application which has been made for discharging the Defendant altogether, on the ground of this mistake, it is quite impossible to entertain it for an instant; there is no sort of foundation for it. If we should not have allowed the amendment, we could not have granted it; but having permitted the roll to be altered, it will immediately be corrected, and all will then be right, and the *committitur* must also, of course, be altered to correspond with the record.

The rule for amending the roll must be made absolute, and that for the discharge of the Defendant must be discharged.

GRAHAM, *Baron*. The whole argument in this case, on one side, proceeds on an insisting upon an adherence to technicalities in manifest defiance of common sense. [His Lordship stated the circumstances.]

The first question is, whether the Court will correct so palpable an error on the roll, arising clearly

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Graham, B.

clearly from mere mistake? If we had not the power to do so, we should be without the means of doing justice to the suitors. On the objection which has been made, that, if these amendments correcting the Records, can be allowed at all, it can only be done during the term in which the Roll is made up, that is not supported by the authority of any case, or on any principle of practice; nor can I see any reason why there should be any such limitation or restriction of the power of the Court. All the former proceedings in this case are correct down to the *postea* and even to the Judgment Roll. We clearly, then, have the means of correcting this mistake by the documents from which the roll is made up. The amendment of the rule for committing the Defendant will follow of course, as a necessary consequence. If, indeed, there were any gross error which had had the effect of drawing the party into any difficulty, by misleading him, or producing an injury of any sort to him, I should have considered that there might then have been some ground for opposing this motion. The rule that a Defendant must be charged in execution within two terms, is an useful rule, and founded on the case with which the Court guards the liberty and ease of the subject, but it has no application in this case which can afford any argument against our amending our Record. This accidental error [stating it] has not worked, nor could it, after the course which has been pursued, have worked any injury, and there is nothing in the reasons which have been urged, why we should not make the amendment to correct the
mistake,

mistake, particularly where, as in this case, every possible precaution has been properly taken to prevent any injurious consequence arising from it. [His Lordship stated the circumstance of the notices having been given, and the measures pursued by the Plaintiff's Clerk in Court.] I am therefore of opinion, that the rule obtained by the Plaintiff should be made absolute, but that it must be on payment of costs, because the amendment ought to be made at the expense of the party whose act occasioned it; and that the rule obtained by the Defendant must be discharged with costs.

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WOOD, *Baron*. I am of the same opinion. I do not consider that the liberty of the subject can be in the least affected by our doing what the Plaintiff requires of us in this case. [His Lordship stated the circumstances and the mistake. We find the *postea* recording the verdict correctly, and the costs have been taxed by the proper officer amounting together to 100*l.* 5*s.* and to that sum there is no doubt that the Defendant is liable. In entering up final judgment, however, the Plaintiff's Clerk, in Court, it seems, made this mistake [stating it]. To correct that mistake, this application is now made to amend the record; and how? By making the sum, with which the Defendant is charged less in amount; an application in favour of the Defendant, to enable him to obtain his discharge on payment of a smaller sum. That it is which is called a proceeding directed against the liberty of the subject. Had the application

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Wood, B.

cation been to amend, by so altering the record as to charge the Defendant with a larger sum, that indeed, would have been, I think, a very great infringement on the liberty of the subject. All that the Court are asked to do by this motion, on the part of the Plaintiff, and all they mean to do, is to correct the error which is shewn to have been made on the face of their Record, and that they have clearly a right to do, where, as in this case, it is an amendment which operates in favor of the Defendant.

It has been said, that the Defendant was necessarily asked if he could pay 105*l.*, and on his saying he could not, he stands committed. That is, because this Court retains the old usage of having the Defendant brought up to the bar to be charged in execution, a practice which no longer prevails in the other courts; and upon that it was urged that he might have been able to pay 100*l.* 5*s.* although he could not pay the larger sum. Now that is not very likely; but in this case any injury which might have arisen in the result, if that were the fact, was prevented by the conduct of the Plaintiff's Clerk in Court; for as soon as the mistake was discovered, he adopted every means to obviate all inconvenience on that score by the full notice which he gave on the same day. Under these circumstances I fully concur with the Court; and indeed, in any case I should think that it would be a strange thing if we could not correct, by the previous proceedings, a manifest error on the

the record, and particularly where the effect of it is in favor and ease of the Defendant, and not in any respect to his prejudice or disadvantage.

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GARROW, *Baron*.—There was no portion of any half hour during which this Defendant has been in prison, when he was not liable to be charged with the sum of 100*l.* 5*s.*, to insert which, in the place of a sum of 105*l.*, it is now sought to amend this record. On an application by summons, a Judge would have immediately ordered the mistake to be corrected agreeably to the fact, and, on tendering the money actually due, that the Defendant should be discharged. In this case the party Plaintiff had himself rendered such an application unnecessary, by voluntarily offering to discharge the Debtor on the same terms.—[Having stated the facts.] The Defendant, from what appears, remained in prison by his own choice, for it is clear that he might have come out at any moment, on paying what he was undoubtedly liable to pay. Had this Defendant been maliciously charged in execution for a larger sum than was really due, he would have had ample satisfaction in the large damages which a jury would have given him for the injury which he had sustained. In this case there is no pretence for attributing any improper motive to the parties concerned in any part of this proceeding. The mistake is visibly a mere clerical error, and arose clearly from an accidental slip. I am of opinion, therefore, that the Plaintiff ought to have leave to amend on
 payment

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payment of the costs of the amendment; and that on those terms the first Rule must be made absolute. The other Rule, for discharging the Defendant out of custody, must be discharged, and, I am of opinion, with costs.

On the question of the costs of either Rule, the Court, on deliberation, after some discussion (during which the Plaintiff's Clerk in Court consented to concede the matter in favor of the Defendant, as to the Rule for altering the Judgment Roll), in consideration of the precedent, and to mark their sense of the opposition to the application, and the attempt to take an unfair advantage of the mistake, by procuring the Defendant's discharge, ordered the

First Rule to be made absolute, on paying the Costs of the Amendment,
without Costs in respect of the Motion: and the

Second Rule to be discharged, with Costs.

MORRELL v. GREGSON.

Gregson v. Morrell, and Dean and Chapter of
Christ Church*.

1822.

Monday,
25th Nov.

THE occupiers, defendants in original cause, and plaintiffs in cross cause, having succeeded upon an issue in establishing the moduses they set up, now applied to the Court for the costs of the cross bill.

Martin and *Pemberton* for the occupiers, submitted that as the original lessee had filed a bill to overturn moduses which had been found before prohibition in time of Jac. 1. and as the *Dean* and *Chapter* had an estate of inheritance in the tithes as lay impropriators:—distinguishing this from a case where Ecclesiastical Rectors were Plaintiffs, who have only a life interest—they were entitled to the costs; but they were refused by

The application to a Court of Equity by cross bill to establish moduses against a bill to overturn them being matter of favour, costs (in Equity) are never allowed—not even where the moduses are established against the lessee of lay impropriators who have an estate of inheritance in the tithes.

The *Lord Chief Baron*, who said, that the application to a Court of Equity to establish moduses, or customs, was an application for favour; and that costs had never been allowed in any case upon such an application, the original bill must be dismissed with costs: as to the cross bill, the Plaintiffs are entitled to their costs at law, and the moduses must be established without costs (a).

(a) See *Clifton v. Orchard*, 1 Atk. 610. and 2 Gwill. 746.

* *Ex Relatione*.

REGULA GENERALIS.

MICHAELMAS TERM.

3 GEO. IV.

IN THE EXCHEQUER.

1822.

Tuesday,
26th Nov.

NOTICE is given, that from and after the first day of next Term, the Evening attendance of a Judge of this Court, in Chambers, in Term time, will be discontinued: and in all future Terms, the attendance will be every day at half an hour after three o'clock in the afternoon.

REGULA GENERALIS.

MICHAELMAS TERM.

3 GEO. IV.

IN THE EXCHEQUER.

1822.

Tuesday,
26th Nov.

TO prevent unnecessary expense to Plaintiffs suing in this Court; in case of notice given by Prisoners of their intention to apply for their discharge under any act made for the relief of Insolvent Debtors,

It

IT IS ORDERED, that after such notice given to any Plaintiff, no Prisoner shall be superseded or discharged out of custody at the suit of such Plaintiff, by reason of such Plaintiffs' forbearing to proceed against him according to the rules and practice of this Court, from the time of such notice given, until some rule or order shall be made in the cause in that behalf by this Court or one of the Judges thereof.

1822.
Tuesday,
26th Nov.

And it is further ordered, that a copy of this rule shall be hung up in the Fleet Prison, in the place where rules of this Court are usually hung.

By the Court.

ABRAHAM and Another, Assignees of Jacobs, a Bankrupt, v. GEORGE and Another, Sheriff of Bristol.

1822.
Tuesday,
26th Nov.

THE Declaration in this case was in *indebitatus assumpsit* for money had and received,

Bankruptcy.

In the case of an action for money had and received,

brought by a petitioning creditor and another assignee of a Bankrupt against a Sheriff, for the amount of money levied by *fiat facias* on the Bankrupt's estate—where the proof of the petitioning creditor's debt was merely the single *prima facie* evidence of the acceptance of a bill of exchange by the Bankrupt before the Bankruptcy, unfortified by any proof of consideration (there having been a notice given that the Plaintiff would be required to prove the consideration), and where the parties were connected by relationship, and did not appear to be connected in business; and where there were circumstances of suspicion surrounding the transaction [for the nature and extent of which see the case]—it was held to be a question for the Jury on the whole matter to pronounce the debt collusive or *bona fide*, notwithstanding *no direct evidence* was given or offered to impeach the acceptance; and on this principle—where there are circumstances of suspicion, and the Plaintiff has notice that he will be required to prove consideration, although, generally, the Plaintiff is not under any necessity to prove the consideration unless it be impeached, yet, in a case where the Jury have a right to require, from the aspect of the whole transaction, something to corroborate the *prima facie* case of proof of hand-

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ABRAHAM
and another
v.
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by the Defendants, to the use of the Plaintiffs as assignees, to recover 552*l.* 1*s.* the amount of a levy made under an execution sued out on the 21st of *June* 1820, at the suit of *John Naylor*, a judgment-creditor of the Bankrupt who had indemnified the sheriff. The Defendants pleaded the general issue.

The cause was tried before Mr. *Justice BURROUGH*, at the last Assizes for the city of *Bristol*, when the Jury found a verdict for the Defendants.

Pell, Serjeant, on the second day of Term applied for a rule to shew cause why there should not be a new trial, on the ground that the verdict was against the evidence, which was in favour of the Defendants in the cause on every point, but particularly in respect of its having been proved (as he stated) that the judgment creditor had full

writing to the acceptance, if the Plaintiff choose so to hazard his success as to rest his case there, he must abide the result: and the Jury may decide against the document, because the suspicion alone leaves the question of fact open to them.

A letter * written by the solicitor of a trader to the solicitor of a judgment creditor [for the exact terms of which see the case], requiring the creditor to delay his execution which he would be entitled to sue out in a few days, giving as the reason of the application, lest he should so involve the debtor as to render him unable immediately to satisfy his engagements, and proposing to pay the debt by instalments, as the only means of enabling the creditor to realise the whole amount of his demand; held, not to be such a sufficient notice of the insolvency of the trader, as to preclude the creditor under the 49th of Geo. III. ch. 121. from levying under his execution, as having been brought by such notice within the terms of the proviso of that statute to be found in the second section, by fixing him with previous knowledge of the Bankrupt's insolvency.

For minor points of evidence held to have been properly left to the Jury, see the learned Judge's report, and the judgment in the case.

A Rule for a new trial, granted on the grounds of the objections made on all these points, was discharged on argument, notwithstanding the learned Judge who tried the cause, reported, that he considered the verdict, in respect of the debt attempted to be proved by proof of the acceptance of the bill of exchange, to be against the evidence which had been laid before the Jury.

* That letter so produced in evidence had been procured, in consequence of the judgment creditor having, on the occasion of being examined before the Commissioners of Bankrupt, been interrogated by them as to that fact, since a former trial had between the same parties, for the same cause of action. The Court strongly reprobated such a mode of acquiring evidence, as being an abuse of the proper object of Bankrupt examinations.

and complete knowledge of the insolvency of the Bankrupt before the time when the execution was levied, so as to come within the second section of chapter 121. of 49 Geo. III. (a) That (it was submitted) had been proved by the production of a letter which is set out in a subsequent part of the case, which, it was insisted, gave sufficient notice (1 M. & S. 351.). And he stated that the verdict had not, for that reason, had the sanction of the favourable opinion of the learned judge who tried the cause.

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Mr. *Baron* GARROW now read the report, which stated, that it had been proved on the part of the Plaintiffs, that a Commission of Bankrupt dated 22d May 1821, against *Isaac Jacobs* of *Bristol*, Glass Manufacturer, was produced, wherein the Plaintiff *Abraham* was the petitioning creditor;—that a witness (*Harris*) who had been clerk to the Bankrupt, *Jacobs*, for 18 years down to the 24th June 1820, proved that the Bankrupt was a Glass Maker till the latter end of June 1819; and that he kept his ware-

(a) Sec. 2.—Enacting “that all executions and attachments against the lands and tenements or goods, and chattels of the Bankrupt, *bona fide* executed or levied more than two calendar months before the date and issuing of such Commission, shall be valid and effectual, notwithstanding any prior act of Bankruptcy committed by such Bankrupt in like manner as if no such prior act of Bankruptcy had been committed; provided the person, at whose suit such execution or attachment shall have issued, had not, at the time of issuing or levying the same, any notice of any prior act of Bankruptcy by such Bankrupt committed, or that he was insolvent, or had stopped payment:” (providing that the issuing of a Commission, although afterwards superseded, shall be deemed such notice, if an act of Bankruptcy have been actually committed).

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house in his possession till *June* 1820. He then proved the Bankrupt's acceptance to a bill of exchange, drawn on him, by the Plaintiff, the petitioning creditor, for 975*l.* dated the 28th of *February* 1820, and payable six months after date. The same witness proved, that for the last year that he lived with *Jacobs* to the latter end of 1819, he stopped his manufactory, and discharged all his men, in consequence, as the witness believed, of his embarrassments, which had arisen from having engaged in building at *Weston-super-mare*;—that *Ivy*, a creditor of the Bankrupt, having called repeatedly before, called on the 16th of *June* 1820, when *Jacobs* was at home; but he having given the witness directions not to pay any more money, and to deny him, he did so, when *Ivy* called, which was in an hour or two after he had received such instructions from *Jacobs*;—that *Cannington*, a Collector of Taxes, had also frequently called for payment of 30*l.* due for Taxes, for which he had threatened to levy, and that he (witness) denied *Jacobs* being at home to him also; because the witness having told *Jacobs* on the 24th or 25th of *June* that *Cannington* had called, he ordered the witness to shut the door, and say that he (*Jacobs*) was not at home, which the witness did. *Harris* stated also, that the Bankrupt's warehouse had been kept open to sell the goods previously made, and for executing orders. The witness further stated that *Cannington* had been immediately afterwards paid, *Jacobs* observing on that occasion, that he must be paid, because the money was due for taxes; and that *Ivy* was also afterwards paid.

After

After certain formal parts of the Plaintiff's case had been proved, it appeared that the examination of *Naylor* (the Judgment Creditor, at whose suit the execution had been executed) before the Commissioners of Bankrupt who sat on *Jacobs's* commission, was read, to shew that *Naylor* knew, before his execution was issued, that *Jacobs* was insolvent. That piece of evidence consisted partly of a letter written by *Bevan* and *Britton*, the attornies of *Jacobs*, and addressed to Mr. *Farren*, the attorney for the Creditor, who had then obtained a verdict as the holder of a bill of exchange accepted by *Jacobs*, proposing terms of accommodation, and requiring time, on the part of *Jacobs*. As very much of the case, indeed the whole of a principal point raised in the discussion, turned on the effect of that letter, it becomes necessary that the whole should be set out. It was in these words:

“ *JACOBS against NAYLOR.* ”

“ SIR,

“ THE Defendant for whom we are concerned, has instructed us to address you on the subject of this action. The bill, on which you have obtained judgment, was, with several others, obtained from our client, a Mr. *Thomas Jarman*, late solicitor of this city, of whose bankruptcy we presume you are well aware, and no consideration or value was ever received by Mr. *Jacobs* in return.—*The failure of Mr. Jarman has considerably involved our client for the present, and renders him unable immediately to satisfy his engagements.* Under

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 and another.

der these circumstances the levy of an execution will be attended with most ruinous effects both to Mr. *Jacobs* and the interests of your client. Mr. *Jacobs* is, however, desirous of meeting his obligations fully and fairly, provided he can obtain a reasonable extension of time: and with this view he proposes, for the consideration of your client, an offer which under all circumstances we think he would do well to accept. It is to give you his, Mr. *Jacobs*'s, notes for the amount of debt and costs, payable by instalments of two, three, and four months after the date thereof, the judgment still remaining as a security to your client, and the bail consenting to the arrangement. Should default be made in either instalment, the whole to become demandable. As your client will be entitled to his execution by *Friday* next, no time is to be lost in determining on the course which should be pursued, and we cannot but recommend the adoption of the present offer as the only means by which you will be able to realize the whole amount of your demand. We hope to have your client's determination on the subject by return of post, or we shall consider it his intention to refuse all compromise.

"Your's, &c.

"BEVAN and BARRTON.

"*Bristol, 20th June.*"

"To *George Farren, Esq. Solicitor,*

"*Threadneedle Street.*"

On the part of the Defendant, the report stated, witnesses were called, the principal of whom was
Cunnington,

Cunnington, the collector, whose evidence, as far as it went, appeared to confirm what *Harris* had stated.

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It then stated that the Defendant's Counsel offered in evidence an order of the Vice-Chancellor, dated the 13th of *April*, 1821, made on the petition of *Naylor*, when a former commission was superseded; and also another order, dated 10 *May*, 1821, made on the dismissal of a petition of appeal; both which the learned Judge reported that he had rejected as inadmissible. The Defendants then produced, by a witness, an Office Copy of an affidavit of *Joseph Jacobs* (referring to 3 G. 4. c. 81. s. 7.), but no part of it was read. The same witness stated that he was present at the former trial of this cause, and heard *Harris* give his testimony, and that he had contradicted him in a statement made now by *Harris*, that he had, on that occasion (a), communicated to the Commissioners his denial of *Jacobs* to *Cunnington*.

The learned Judge added, that he had stated the whole of the evidence on both sides to the Jury, and had told them that the matters for their consideration were the trading—the petitioning Creditor's debt—the act of bankruptcy—and, lastly, whether, if those were made out to their satisfaction, *Naylor* knew, before issuing his execution, that *Ja-*

(a) Upon that occasion the Plaintiff set up another debt, which he failed to establish, and was therefore nonsuited. It appeared on that trial that the Plaintiff was a relation of the bankrupt. That is noticed in the judgment in this case.

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cobs was insolvent or had stopped payment—that they could have no doubt on the two first points;—that the acceptance of the bill, without other proof, was sufficient evidence for their consideration as to the debt;—that *Harris* had sworn to the denial to *Ivy* and *Cunnington*, and that *Cunnington* had confirmed the denial to him;—that if they believed that the trading, the petitioning Creditor's debt, and an act of bankruptcy had been proved, the Plaintiffs would be entitled to their verdict for the amount of the levy, if they had made out to the satisfaction of the Jury, that, at the time of the levy, *Naylor* had notice of the insolvency of *Jacobs*;—that that depended on the examination of *Naylor* (before the Commissioners), and the letter mentioned in it;—and as to that point his Lordship directed the Jury that the examination and letter contained strong proof of that fact. The Jury found for the Defendants.

The learned Judge concluded his report by stating, that *as the Jury had no evidence* before them, on the part of the Defendant, to oppose the acceptance of the bill of exchange(*a*), and believing that the trading and act of bankruptcy were satisfactorily proved, *his Lordship therefore thought the verdict was against the evidence* on the rest of the case.

A copy of the letter alluded to accompanied and made part of the Report, and his Lordship

(*a*) Notice had been given to the Plaintiff that he would be required to prove the consideration.

observed,

observed, that it was understood that both the denials to *Ivy* and *Cunnington* had preceded the levy.

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Pell, Serjeant, *C. F. Williams*, *E. Lawes*, and *Wilde*, shewed cause. They submitted that the questions in the case were questions of fact depending on the balance of evidence, and therefore that they were properly left to the Jury, who were the fit judges of the whole case; and that there was nothing stated in the report of the evidence at all calculated to impeach the verdict. They complained of the mode in which the evidence of what passed before the Commissioners, on the examination of the bankrupts since the former trial, had been elicited for the purpose of sustaining the present action.

[They were about to read affidavits of facts connected with this part of the case, but they were withdrawn on an objection made by *Gaselee* to their admissibility.]

They contended that there was nothing in the letter which could have the effect of fixing the Defendant with a knowledge of *Jacobs'* insolvency: and they urged strongly, that, under the circumstances, the debt was not sufficiently proved for the purpose of sustaining the present action, with reference to the object for which it was attempted to be established.

To shew that the doctrine of the relation of the act of bankruptcy had been considered to have
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been carried to the extreme verge, and that it had been judicially lamented, and that in all cases payments were not affected by it, they cited the language of the Chief Justice of the Common Pleas in *Coles v. Wright* (a); and concluding by urging, that as the granting a new trial was always discretionary with the Court, this was clearly not an occasion in which they should interfere to disturb the verdict, which manifestly accorded with the justice of the case.

Gaslee and *Adam*, in support of the Rule, insisted that the verdict, being contrary to the evidence in the cause, and against the opinion of the learned Judge, ought to be set aside. They particularly relied on the petitioning creditor's debt having been fully proved according to the usual course in such cases, without any attempt to impeach it having been made, which destroyed any effect which the notice to the Plaintiff to be prepared to prove it might have had; and urged that it was now too late to say that it had not been sufficiently or satisfactorily established, or that the Jury had not so considered it; for that was precisely what, in truth, they ought to have done; and their not having done so was one of the grounds of the present application for a new trial.

But they insisted chiefly on the objection founded on the statute that the judgment creditor had prior knowledge of the insolvency of the bank-

(a) 4 Taunt. 198.

rupt; and they contended, that however the Plaintiff's means of proving that knowledge may have been obtained, it was, when produced, good and sufficient legal evidence to substantiate the fact which could not be rejected, and must be acted upon both by the Jury below and the Court above. That the letter was abundant proof of that, they submitted could not be doubted; and they cited and relied on the case of *Bayly v. Schofield* (a) (in which the question of what amounted to sufficient notice to infer knowledge of insolvency, which, it was admitted, was something different from bankruptcy and from stopping payment, was discussed at great length, and much considered), where the Judges of the Court of King's Bench were unanimously of opinion that a similar letter was sufficient for that purpose; as (in the language of Lord *Ellenborough*, in that case) it "emphatically shewed the party to be in insolvent circumstances", which his Lordship explains to mean, a person not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do. They therefore submitted, that for these reasons, seconded as they were by the disapprobation of the Judge, there must be a new trial.


RICHARDS, *Lord Chief Baron*. In this case the jury have found a verdict for the Defendant, and it is clear that the trial was matter of great delibe-

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(a) 1 Maule and Selw. 338.

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ration on the part of the judge, the counsel, and the jury. I cannot feel disposed to set aside the verdict under these circumstances, where the single question is merely whether the jury have given due credit to the witnesses? The three points which were left to the jury, and have been determined by them, do not appear to me to have been improperly decided: on the contrary, I think that they would have done wrong if they had found otherwise than they have done. As to the petitioning creditor's debt, the proof of it was attended with many circumstances which involved it in doubt. On the trial of the first action (and we may in this case as it comes before us now, under the circumstances, be permitted to allude to what passed then) this debt was not attempted to be set up; the only evidence then given was of a mortgage debt. Upon this last occasion, however, the Plaintiff, it seems, amending his case in that respect, has produced this acceptance, but under circumstances, as it strikes me, which make it certainly liable to very great suspicion, and if, on the former trial, there had been, in that respect, any surprise on the counsel engaged in the cause, that surprise could not have extended to all the parties concerned in the transactions or in preparing for that trial.

The next point made is, that no consideration was proved to have been paid for the bill. Notice had been given that the consideration would be required to be shewn. The Plaintiff therefore was
 prepared

prepared to expect that the consideration would be made the subject-matter of investigation, and that the proof of the debt would be resisted on that ground. The Plaintiff, however, contented himself with proving the hand-writing of the acceptance, and, from the connexion subsisting between the parties and other suspicious circumstances, the counsel for the Defendant were satisfied that no other opposition to the actual existence of the debt was necessary than the negative effect of the Plaintiff's mode of proving it, which made it, under the circumstances, a proper and fit question for the jury; and being so, I think they would not have found rightly if they had considered that the Plaintiff had done enough in this case to satisfy the *onus* on him, he not having, in a case which seems to me from its circumstances to have required it, at all attempted to justify the demand set up or shew an actual debt to be really due.

Then it was objected that the Act of Bankruptcy had not been proved, and, if the testimony of Harris had been believed, undoubtedly that objection would have been answered, for he gave evidence certainly which, if true, would have established that fact. But that was a question entirely for the jury, for there appears to have been some contradiction in the evidence on that part of the case most clearly, but if the jury did not choose to believe the Plaintiff's witness, there was an end of that; and they clearly did not chuse to believe him.

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The question of the Defendant's having had notice of Jacobs's insolvency, was a very material one, but I am of opinion that the jury did right in putting the construction which they have put on the letter given in evidence. I do not, at present, think it necessary to make any observation on the mode by which the evidence given on the bankrupt's examination was obtained. The Commissioner, it seems, did put to the bankrupt on his examination a question, certainly the answer to which might have been of use to the Plaintiffs in this case, if it had gone far enough. I confess, however, that I do not entertain much respect for that sort of caution which introduces into proceedings under commissions any matter of examination which is not in some degree necessary. Now, whether this letter was or was not such a notice as brings the judgement creditor's execution within the statute, and that will depend upon the terms of the Act. [His Lordship adverted to and read the preamble.] The Act then provides that all executions and attachments against estates of bankrupts *bonâ fide* executed or levied more than two calendar months before the date and issuing of the commission shall be valid and effectual, notwithstanding any prior act of bankruptcy, committed by such bankrupt, provided the person at whose suit such execution or attachment shall have issued had not at the time of issuing or levying the same any notice of any prior act of bankruptcy by such bankrupt committed, or that *he was insolvent or had stopped payment*. I cannot consider the term insolvent as used
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in that part of the statute connected as it is with bankruptcy and stopping payment, to be used there in its common acceptation, but as meaning an insolvency of so decided and unequivocal a character as to be immediately followed by bankruptcy or stopping payment as a necessary and inevitable consequence. Being of that opinion as to the meaning of this term so found between the two others, I cannot consider that there is any thing in this letter affording notice, either express or constructively, of *such* an insolvency as is contemplated in this Act of Parliament. [His Lordship read the letter.] There is not the most remote hint of an actual insolvency in any part of it. It is no more than if I should say to any pressing creditor, "I am, as you well know, worth 100,000*l.* but I am nevertheless quite unable to pay you now the 5000*l.* which I owe you", and should require him to give me time till some given event should put me in possession of so much money. Would that be a declaration of my insolvency? I think it would be nothing like it. This letter seems to me to be very little distinguishable, and clearly not to be within the Act; because, as I have already said, when I find those three words used concurrently in the statute, I cannot bring myself to construe the insolvency there mentioned and as there used; as meaning any thing short of an utter impossibility on the part of the debtor to pay his debts generally.

GRAHAM, Baron. There is no point in the case which presents any difficulty at all to my mind: or
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creates any anxiety except the last, which raises a question on the effect and operation of the letter written to the solicitor of the judgment creditor by the solicitor of the bankrupt. With the greatest respect for the very high authority of the names whose judgements have been cited in the case referred to of *Bayley v. Schefield*, the notion of insolvency which those learned judges appear to have entertained with reference to the facts of that case does seem to me to be much too loose and general to be applied to the term with reference to the object of this statute. Allowing the facts stated in the letter to amount to what might afford a criterion for judging of a probable approach to insolvency in certain events, it would still be a very different state from that which appears to have been contemplated by the legislature as meant to come within the proposition in the statute.

I will also say nothing more on the subject of the mode by which this evidence was got at, than that if it had not been for the accident of *Naylor* having been pressed in his examination before the commissioners between the first and second trial, there would have been no possible means by which this piece of evidence could have been introduced into the cause, for the mouths of the attorneys would have been closed on the score of confidence. But, admitting it to be proper evidence and properly procured, what does it in fact really amount to? If indeed, the proposals contained in it and the statements made of the temporary affairs of the person
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spoken of be conclusive of the insolvency of the party on whose behalf it was written, there is probably no man, however rich he may be, who is largely engaged in mercantile transactions in this commercial city, who may not be frequently chargeable with being in a state of insolvency, for he may, notwithstanding his wealth, be occasionally so pressed from accidental circumstances as to find himself under the necessity of asking for time to satisfy demands against him: and all that is asked here is that the creditor will give the trader time. I consider that it requires an infinitely stronger case than this to bring the creditor's execution within the exception in the statute. The notice of insolvency there intended, when it is provided that such notice shall render the execution void, is a previous unduly acquired knowledge of an actual incompetency to discharge engagements, followed by an act affording ground for some petitioning creditor's suing out a commission against him: and the object of the statute was to prevent the creditor who had obtained such knowledge from pressing at once for his particular debt to the injury of the general body of the creditors at large. But this letter gives no such knowledge to the party. There is nothing in it which intimates that the debt is even endangered, which would be altogether inconsistent with asking for time. It says, "do not press at present, or your debt may be endangered." [His Lordship read the letter.] The whole amounts simply to a pressing request for time, and is nothing like a notice of general insolvency.

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As to the proof of the petitioning creditor's debt, I think it was quite enough to have apprized the Plaintiff, as he has been apprized, that the validity of the debt set up by the petitioning creditor was intended to be disputed, and to have cast on him the necessity of offering some evidence of the foundation of his demand for the satisfaction of the jury at least, although it may not for any other purpose have been necessary; for by his not doing so he furnished them in his particular circumstances with an inference that he had not the means of doing it, and, by paying no regard to the notice given that the integrity of the transaction, ~~was~~ intended to be scrutinized, his abstinence ~~was~~ sufficient to excite a suspicion, under all the circumstances, that there had been no consideration, in fact, for the debt which he set up. It might not have been in the power of the Defendants, as it seldom is in such a case as this, to impeach the honesty of the transaction, and therefore the jury had a right to expect that some evidence of it should have been given by those in whose breast the truth or falsehood lay. The result was clearly that they considered the debt merely collusive. The act of bankruptcy, too, I consider a question entirely for the jury.

Wood, Baron. I am entirely of the same opinion. A great many points have been made on this motion for a new trial, but there is, in my opinion, one which alone is fully sufficient to warrant the verdict of the jury, and that is the very doubtful state in which the Plaintiffs left the proof of the

the petitioning creditor's debt. There were so many suspicious circumstances attending it, that the jury were entitled to take the whole into their consideration, and their verdict would be quite right if it rested on that alone. That debt was disputed before on the former trial, and it is admitted that formal notice was given that the petitioning creditor would be required on the trial to prove the consideration, and notice was given to produce books and accounts.

It has been said that the Plaintiffs were not bound to prove consideration. I agree that they were not bound to do so—that is, they might rely, if they chose to do so, as they have done, on such evidence as they could give without. They have relied on the *primâ facie* evidence of the handwriting of the acceptance, but in so doing they were bound by it, and must depend on that alone. If they had the means of fortifying that proof, and corroborating their *primâ facie* case by giving some evidence of consideration which, under all the circumstances of so particular a case, would have made it safer by giving additional strength to it, at least, and they did not choose to do so, it must go to the Jury with all its circumstances, and I think they were well warranted in finding a verdict against it.

If the books which were in Court had been produced on the part of the Plaintiff, although they would not have been evidence alone, yet they might have strengthened the case which rested on

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the bankrupt's acceptance, if the Plaintiffs had read them in evidence, but no attempt was made to add to the naked fact of the acceptance by the bankrupt.

[His Lordship then adverted to the situation of the parties, and stated the circumstances of this case as far as related to the Plaintiff Abraham, and the bankrupt, remarking on the improbability that persons so unconnectedly situated in respect of their several businesses should act as they had been represented to have done—that the Plaintiff should have been ignorant of the bankrupt's embarrassments and state of affairs, after he had furnished, by discharging his workmen and ceasing to carry on his business, such obvious proofs of his insolvency to any one so intimately connected with him—and that if the money claimed to be due had been really advanced, and at different times, the Plaintiff should be so totally destitute of the means of proving any part of the consideration, which, his Lordship observed, he could not be presumed to have neglected if he had possessed any : and he applied the same observations to the consideration being, as had been suggested in argument, for some antecedent debt previously due from the bankrupt to the Plaintiff.]

It is equally improbable (continued his Lordship), that Abraham, who must have known the state of Jacobs's affairs, should have lent him so large a sum under the circumstances at once ; or that, having in his possession the bill of exchange,

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he should have kept it by him without making any kind of use of it until it became necessary, in consequence of Jacobs's failing condition, to sue out a commission of bankruptcy against him. These improbabilities all called on the Plaintiff to make out a stronger case than the mere production of the bankrupt's acceptance, and he might, one should think, in a *bond fide* transaction, easily have done so. It would be strange if Harris, the bankrupt's clerk, never knew any thing about it, and could not have given some evidence of it, or if the bankrupt's books should not contain entries which would shew it: but in fact no proof at all in so material a part of the case was given or offered.

In a case of so much suspicion, I think it was properly left to the jury to say what degree of credit it was entitled to, and I think they were fully warranted in the verdict which they have found.

GARROW, *Baron* (having stated the parties, the form of action, the directions of the learned judge to the jury, and the result). We are desired to send this case down again to a new trial, and, before we do so, we ought to be satisfied that there is a great preponderance of evidence against the present verdict, so much so that the jury ought to have found the other way. I agree with my Brother Wood in thinking that in a case of this sort where a bill of exchange is produced to support a petitioning creditor's debt, the jury may, under circumstances, disbelieve the document, unless

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something more be given in evidence to support and confirm it.

[His Lordship strongly reprov'd the course of examination taken under the commission in order to produce collateral evidence for other purposes than that for which the commission issued, and the examination was intended, as unfair both in itself and in its consequences.]

But, continued his Lordship, what does this evidence, such as it is, prove after all? Nothing like what it would be necessary to shew, in order to fasten on the creditor a knowledge of the insolvency of the trader indebted to him: and indeed his own subsequent conduct in the transaction shews that he had no such knowledge or belief, for he suspends his execution in consequence. The letter itself is merely a request of time. The same necessity may occur to the richest merchant on the Exchange. Men do not usually ask a creditor to suspend his execution on the score of their insolvency, nor do creditors ordinarily do so on that ground.

But we are asked to set aside this verdict, because, it is said, the jury ought to have inferred that the judgment-creditor had sufficient previous notice of the debtor's insolvency to be within the provision of the statute with which the Plaintiff seeks to effect his execution. Insolvency, however, is not a question of law, but of fact, and the actual insolvency or the knowledge of it were both
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matters for the consideration of the jury under all the circumstances, and they, who were merchants, were quite competent to judge both of the question of the appearance of insolvency and of the judgment-creditor's means of knowing it, and whether there was any thing in this letter from which, amongst tradesmen, the indisputable conclusion that the party who was the subject of it was insolvent, must of necessity be drawn.

I am clearly of opinion that there is no ground for disturbing this verdict.

Per Curiam,

Rule discharged.

J. PRINGLE v. ISAAC, Esq.

Wednesday,
20th November.

THIS action—on the case against the late Sheriff of *Worcestershire*, for a false Return to a writ of *feri facias*, issued against *W. Pringle*, at the suit of the Plaintiff (his brother), endorsed to levy 206*l.*—was tried at the last Summer Assizes for that county, when Mr. *Baron GARROW* nonsuited the Plaintiff, giving leave to move to set it aside, and

Where the Attorney of a judgment creditor delivered to the Sheriff a writ of *feri facias* returnable on a day certain, with directions by letter, not to execute it till the return, unless another

execution should come in, in the mean time, and afterwards sent in an *alias*, accompanied with the same directions; and the Sheriff, upon another execution coming in, issued warrants on, and executed both writs on the same day, giving precedence to the last execution, and satisfying that wholly, first, out of the money levied, and then paid over the remainder, in part satisfaction of the execution first delivered, and returned that payment and *nulla bona* as to the residue—it was held that the Plaintiff could not maintain an action against the Sheriff for a false return: and that a nonsuit on that ground had been properly directed, the case being within the principle of *Kemland v. Macaulay*, and not distinguishable in the circumstances.

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enter a verdict for the Plaintiff, on the last count of the declaration, for 61*l.*, the sum assessed between the parties by consent.

The averment in the first count of the declaration was, that the Defendant entered, &c, under the writ, and took, &c., and levied the amount; and the false return charged was, that he had caused to be levied 56*l.* 16*s.*, and *nulla bona* as to the remainder. In the second count it was averred, that the Defendant did not, nor would levy the whole debt and damages; and the same false return was charged.

Plea, the general issue.

The facts of the case as proved in evidence on the trial were shortly these:—On the 6th of *June* 1821, the Plaintiff's Attorney addressed the following letter to the Under Sheriff of *Worcestershire*.

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“ I HAVE desired my agents, *Jenkins, James*, and *Abbott*, of *New Inn*, to send you a *fieri facias* against the above named Defendant. And as it is intended to guard the property against another execution, which is expected against it, I will thank you to hold the same without putting the warrant in the officer's hands until the return, unless you should be obliged to execute it by having another execution come into the office; and should you not have any other, I will thank you
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to suspend the execution of this, as I wish to extend the return of it, to give the Defendant an opportunity of working up some materials which would otherwise sell to a great loss."

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On the 8th the Under Sheriff accordingly received the *feri facias* from town. On the 18th he received the following letter from the Plaintiff's Attorney.

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"As I presume this *feri facias* is now returnable, I will thank you to inform me whether it has been executed; and if not, I will send you an *alias*, which you will please also to hold until the return unless you should have any other execution against the same Defendant."

On the 24th of *June* the *alias feri facias*, mentioned in the second above letter, was also received by the Under Sheriff, by the post, from Messrs. *Jenkins, James and Abbott*, which was also kept lying in the office in the same dormant state. The last *feri facias* was made returnable the last day of Michaelmas Term, passing over greater part of Trinity Term.

On the 15th of *July*, a *feri facias* issued in a cause wherein *William Burgwin* was Plaintiff, and the same *William Pringle* Defendant, on a judgment entered up for 6*l.* for damages and costs; for levying which, the Plaintiff's Attorney, in that suit, indemnified the Sheriff.

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The Sheriff thereupon granted his warrant to levy under the writ on the judgment at the suit of *Burgwin*, on the 16th of *July*; and on the same day, he also issued a warrant to levy, under the former writ of *fieri facias* in the office, against the same Defendant, at the suit of the Plaintiff *Pringle*. Under those warrants the Sheriff's Bailiff levied and sold to the amount of 130*l.* 1*s.* 11*d.* out of which, the amount of *Burgwin's* execution and all expenses were first paid over, in the whole 72*l.* 5*s.* 11*d.*; and the remainder 57*l.* 16*s.* paid over to the Sheriff on account of the present Plaintiff's execution; whereupon the Sheriff made the return stated in the declaration.

In the early part of the term, *Taunton* obtained a rule, on the part of the Plaintiff, calling on the Defendant to shew cause why the nonsuit should not be set aside, and a verdict for 61*l.* entered for the Plaintiff, on the ground that the Plaintiff's execution ought to have been first satisfied, the writ having been delivered to the Sheriff before that of the Plaintiff in the other suit: and he relied on the authority of *Hutchinson v. Johnson* (a), where it was ruled that where two writs of *fieri facias* are delivered to the Sheriff on different days, the party whose writ was first delivered is entitled to priority of satisfaction, if no sale have been made, although the seizure were first made under the writ delivered to the Sheriff subsequently. He also cited the cases of *Payne v. Drew* (b) and *Small-*

(a) 1 Term Rep. 729.

(b) 4 East's Rep. 523.

comb v. Buckingham(a), to shew that the Plaintiff in this case had his remedy against the Sheriff.

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Mr. *Baron* GARROW having reported the evidence in substance, as already stated,

Jervis, Russell and Ryan, shewed cause. They distinguished this case from those relied on by the Counsel for the Plaintiff, in that there was, in this instance, on the part of the Plaintiff, at least, laches, if not an intended fraud, in the delaying the execution of his writ; and that therefore, as there was no wilful postponement of the first execution by the Sheriff, he was not liable to the Plaintiff for what was the consequence of his own act. This case, therefore, they submitted, was in principle the same as that of *Kempland v. Macauley* and *another* (b), where the Plaintiff's Attorney having written to the Sheriff's Officer, directing him not to levy under the writ till a future day, Lord KENYON held that, in such a case, the Sheriff might execute another writ, coming in in the mean time; for that the Sheriff was not to keep the first writ hanging over the heads of other creditors, but ought to levy under the last execution, as if no other had ever been delivered to him. That doctrine, they urged, was precisely applicable to the circumstances of this case. They also cited the case of *Smallcomb v. Buckingham* (as reported in Lord *Raymond*) (c), where it was held—in a case wherein the execution of a party who had taken his

(a) Salk. 320. (b) Peake, N.P.C. 66. (last edit. 95).

(c) 1 Ld Raym. 252.

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writ earlier in the day into the Sheriff's Office, but would not take a warrant upon it, was postponed to that of another person who had afterwards brought in his writ, and sued out a warrant—that no action lay against the Sheriff; and the reason given is, “because he who delivered his first writ would not take a warrant from the Sheriff to levy the goods, so that it seems he had a design, only to keep the execution in his pocket, to protect the Defendant's goods by fraud.” In this case, they urged that that very purpose was avowed by the letter of the Plaintiff's Attorney; and therefore, after citing *Bradley v. Windham*, to the same point, they insisted that the verdict ought not to be set aside, as there was no ground either on the facts or the law of the case for entering a nonsuit.

Taunton and *Campbell*, in support of the Rule, distinguished this case from that of *Kempland v. Macauley*, because in that case the postponement being to a future day *certain*, the Sheriff would be bound to execute an intermediate writ; or he would otherwise delay all such executions as should come into his office in the interval, which it was obvious he could not be called upon to do; whereas here he is only desired to delay the execution of the first writ—not for a given time certain, but only till the very contingency should happen, which has occurred, and on the second writ coming in, the request was countermanded, and the suspension of the first execution was at an end. They submitted that a creditor had a right, from motives of humanity, to delay himself without

without fraud, and especially for the laudable purpose expressly stated in the letter of the Plaintiff's Attorney on this occasion. They therefore submitted, that on the general principle of law in such cases, the present Plaintiff had a priority, and that the Sheriff was liable to him in this action.

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RICHARDS, Chief Baron. We are of opinion that this Rule must be discharged. The decision of Lord KENYON, in the case of *Kempland v. Macaulay*, is a very sensible and just decision, and establishes a wholesome distinction: and I should be sorry to see it narrowed or avoided by any nice distinction. In this case, it is quite clear, the Plaintiff was endeavouring to protect the goods of his brother, from time to time; but admitting his intention to have been honest, and not fraudulent, and really what it is stated to be, if we were to permit this sort of delay we should, at least, be opening a very wide door to fraud in all such cases. There could have been no reasonable pretence for not executing the first writ before the return, and it is quite impossible to think that there was any intention to execute it if the other execution had not come in.

GRAHAM, Baron. The intention of the Plaintiff cannot be doubted in this case, and without imputing fraud, the laches affords sufficient ground for our discharging the present Rule. I think the Sheriff was really, not only justified, but bound to do what he has done under the circumstances. He would have neglected his duty if he had obeyed the Plaintiff's directions, for he could not
 preserve

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preserve to the Plaintiff his priority under any circumstances. I am therefore of opinion that the Sheriff's return was right.

WOOD, *Baron*. I certainly cannot, in principle, distinguish this case from that of *Kempland v. Macauley*. A distinction has been attempted to be drawn because, in that case, the execution was postponed till a *certain day*; whereas, in this case, it was postponed till an *uncertain event*. The question of fraud, if there were any doubt about it, was a fit question for the Jury, and, I think, if it had been left to them, they would have very properly disposed of it; but I am of opinion that it ought not to have been left to them at all. I have no doubt that we ought to discharge this Rule.

GARROW, *Baron*. There can be doubt that there was, in this case, a fraud (I mean in the legal sense of the word) without, perhaps, any imputation on the moral conduct of the Plaintiff. I say now, as I did at the trial, that Sheriffs should, in all cases, consider themselves public officers, and should act impartially as such, without lending themselves to any plan of accommodation suggested between parties, or adopting any terms proposed by one set of creditors, which may, in the result, be prejudicial to another, and I think they ought to be protected when they do so, by the courts. I never thought that there was any foundation for the present action, and I therefore fully concur in the opinion that this Rule ought to be discharged.

Rule discharged.

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LOWE v. FIRKINS.

THIS was a suit for the small tithes of the parish of *Grimley*, with the chapelry of *Hallow* annexed, in *Worcestershire*. The bill prayed an account in the usual manner. The Defendant, in his answer, claimed to pay a modus of 10s. in respect of a certain farm called *Green Street*, and another modus of 7s. in respect of another farm called *Topstile*, in his occupation, and made a tender of those moduses. The Defendant further admitted certain other lands in his occupation to be liable to tithes in kind, and made a general submission to pay whatever might be found due to Plaintiff in respect of the tithes of the last mentioned lands, and in respect of *Easter* offerings.

Where the Defendant in a tithe cause submits to a part of the Plaintiff's demand, the Court will, on motion for that purpose on the part of the Defendant, refer it to the Master, in any stage of the proceedings; to ascertain what is due, and to tax the costs, the Defendant undertaking to pay the amount without prejudice to any other question in the cause.

Sclater, on the part of the Defendant, moved,
“ That it might be referred to the Master to take an account of all the titheable matters and things had and taken by Defendant upon and from all the lands in his occupation, except the farms and lands called *Green Street* and *Topstile*, in the pleadings mentioned, since the time of Plaintiff's induction, and also of the *Easter* offerings admitted to be due to Plaintiff, and to tax the Plaintiff's costs of the suit so far as respected the titheable lands, and the costs of taking the said account, and of the report upon such reference—the Defendant undertaking to pay the amount of the value of the titles of such titheable matters and things, and also

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also the said costs, when taxed, and such reference to be without prejudice to any question respecting the said farms called *Green Street* and *Topstile*."

Ellison opposed the motion, on account of its novelty, and from an apprehension that the proposed reference might prejudice the evidence as to the lands alleged to be protected by the *modus*: and because a decree would be more beneficial to the Plaintiff, inasmuch as a decree might be pleaded hereafter against any future occupier of the same lands; and also on the ground of the advanced state of proceedings in the cause; a commission to examine witnesses having been issued, though not yet executed.

Sclater admitted he could not cite any case precisely similar to the present, but stated, that it was the familiar practice of the Courts to permit a Defendant to stop and put an end to a cause at any stage of the proceedings, by submitting to pay or do the thing demanded, with costs, and that the present case was only distinguishable inasmuch as here the Defendant only made a partial submission.

The *Chief Baron* said he considered it a novel application; but as it did not appear objectionable, he would look at the brief of the pleadings, and give his judgment to-morrow.

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The *Chief Baron*, now, after stating the circumstances

stances of the case, said he did not think the reference would affect the question as to the moduses, and granted the motion. The effect of it, he observed, would be equal to a decree, and the party would, by the course now adopted, be obliged to pay all that was due, and the Plaintiff would get his money a year or two sooner.

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The *Chief Baron* cited a case [*it is presumed the case cited by Lord Eldon, in 17 Ves. 278.*] in which Lord *Rosslyn* directed a reference of the title immediately on motion, as in a suit for specific performance.

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EARL OF FALMOUTH v. Moss, Administratrix of
J. Moss.

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THE pleadings in this case were as follows:

The declaration (in covenant for not repairing, &c.) stated, that *George E. Viscount Falmouth* was seised in fee, and on the 26th day of October, 1803,

ces loam served on the steward to produce them on the part of a Defendant on the trial of an action at law, in which his employer was Plaintiff.

The steward may, however, be examined as a witness to give evidence of the existence and contents of a particular document, if due notice have been given to produce it specifically.

A Steward is not, like the legal adviser of a party, a privileged person protected by his relative situation from disclosure (to a certain extent, at least, as where the employer would be compellable himself to discover the matter by answer to a bill in Equity) of his knowledge of his employer's affairs, and the existence and contents of muniments, on the ground of the necessary confidence unavoidably reposed in him, and the immediate communication between them, as analogous with the relative situation and intercourse of attorney and client.

See *quære* how far the liability of such a person to such an examination extends, and whether there may not be cases wherein his situation would privilege necessary communications, and his knowledge acquired as steward of his employer, and protect such communications and knowledge?

by

Evidence.

Possession of a steward of documents, as leases, &c. held to be the possession of his employer, and therefore not affected by a *subpoena du-*

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by indenture demised to *Joseph Moss* to hold from 29th *September*, 1805, for fourteen years. Covenant to repair, &c. It then averred the death of lessor, and descent to Plaintiff *as his son and heir*.

The pleas were, 1st. That the lessor was seised only for life, and at his death the demise determined. 2nd. *Non est factum*. 3d. Traversing the descent. 4th. That *J. Moss* and Defendant had repaired. 5th. That they did not suffer the premises to be ruinous.

Replication that the lessor was seised in fee taking issue on the other pleas.

The cause was tried at the last Assizes for *Cornwall*, before Mr. Justice RICHARDSON.

The Plaintiff having proved a *prima facie* case of seisin in fee in *George Lord Falmouth*, the lessor; the Defendant endeavoured to prove a seisin in *Hugh Lord Falmouth*, the uncle of the Plaintiff. For that purpose the Defendant first called several witnesses to prove acknowledgments by an old tenant during his tenancy, that he held the farm (called *Tolverne*, the premises in question) of *Hugh Lord Falmouth*, but the learned Judge having been of opinion that that part of the evidence failed, the Defendant then called back the Plaintiff's steward for that purpose. That witness had been served with a *subpoena duces tecum* by the Defendant, to produce leases, &c., but the Judge thought that the witness's possession of such documents, in his capacity of steward, was the possession of his employer, the

the Plaintiff, and therefore not affected by the *subpœna duces tecum*.

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The Defendant, then, having proved a notice served on the Plaintiff to produce leases, &c., and particularly the lease from *Hugh Lord Falmouth* to such tenant, proceeded to examine this witness as to the contents of the lease so specified in the notice.

That examination was objected to, on the ground that he was not bound to disclose matters affecting his employer's title which had come to his knowledge confidentially, as the steward and agent of his employer.

To that objection it was answered, that the privilege was confined to the professional confidence reposed in an attorney or barrister; whereas this witness was neither. The learned Judge thereupon received the evidence, reserving the objection.

The Jury found, by their verdict, that the late Lord *George* was tenant for life at the time of granting the lease.

2nd. For the Plaintiff, on the issue of the repairs. Damages 50*l*.

Pell, Serjeant, moved this Term for a Rule to shew cause why there should not be a new trial, on the ground of objection raised at *Nisi Prius* as to the privileged testimony of the witness which

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had been then insisted on; and he informed the Court that it was with the permission of the learned Judge who tried the cause that this application was made, he himself being desirous that the point should be determined on argument, if the Court should think the question a fit subject-matter for discussion.

A Rule having been granted, Mr. Baron GARROW now read the report of the evidence; the material part of which consisted of the foregoing statement of what passed at the trial: to which it will be sufficient to add, that the Plaintiff's Steward produced a lease dated 26th *October*, 1803, between *George Viscount Falmouth* and *Joseph Moss*; whereby Viscount *Falmouth* demised to *Moss* the farm of *Tolverne* (the premises in question), *Habendum* from *September*, 1805, for fourteen years. Covenant to repair premises and fences, and yield up so repaired. Lessor died in 1808. The present Lord *Falmouth* was his eldest son. *Joseph Moss* died in 1815. The witness had received rent since the late lord's death from *Joseph Moss*, and since his death from a tenant in possession, on the part of the Defendant. The house was proved to be very much out of repair, and the witness had asked 300*l.* for repairs in 1819, and 150*l.* in 1820.

On behalf of the Defendant, after a notice to produce all leases and counterparts granted by *Hugh Lord Falmouth* to *John Cornish* had been read, the examination of the witness *Curgenven* (the Steward to the Plaintiff) was stated. In that
part

part which that had been objected to, for the sake of unequivocal accuracy, his Lordship reported the principal questions put, and the answers which followed. Having stated that he was a conveyancer, *but not an attorney*, the examination thus proceeded.—To the following question, “Have you any lease granted by *Hugh Lord Falmouth* to *John Cornish*?”—the witness’s answer was, “I have the fragment of a lease.”—To the questions which were afterwards put to him, his answers were, “I have that here—*it is the fragment of a lease granted by Hugh Lord Falmouth to John Cornish, of the farm of Tolverne, in the parish of Tilleigh.*—I saw it about a week since.—It was executed by Lord *Falmouth.*—It is signed ‘*Falmouth.*’—By *Hugh Lord Viscount Falmouth.*—I do not know whether it contains any demise.—I do not know whether there is any demising part.—It is on paper.—I have about half of it, torn in different parts.—I have part of the beginning and part of the end.—It is a lease by *Hugh Lord Falmouth* to *John Cornish* of the farm of *Tolverne.*—There is no seal to it.”

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On his cross-examination he said, “I knew *Hugh Lord Falmouth* when I was eight years old.—I was not his Steward. I had nothing to do with this property.—I only saw him once or twice. I never saw him write.—I have a recollection that it was a lease of *Tolverne.*”

Being re-examined, he said, “*Hugh Lord Fal-*
mouth”

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mouth died in 1782.—I know the present and last Lords *Falmouth*, and their hand-writing.—The word *Falmouth* is not their hand-writing.—I think there is no seal.”

The rest of the evidence reported went to the question of the title of the Plaintiff’s ancestor and to the repairs.

His Lordship, in concluding his Report, observed—after having stated the objection to the evidence resting on the obligation which the admissibility of such evidence would impose on a Steward of disclosing his employer’s title—that he had very *unwillingly* received the evidence, but reserved the objection.

Adam now shewed cause. He contended, that on principle there was nothing in the relation of master and steward which could protect the knowledge possessed by the latter of the affairs and business of the former from disclosure in a Court of Justice, on the ground of confidence, or it might be extended to all the servants in the employ of any party. He urged that the rule of evidence, in that respect, as founded on the authorities, was confined exclusively to the case of confidential communications necessarily entrusted to the legal adviser of the party, and that the protection or privilege was in all the cases expressly stated to be restricted to Barristers, Solicitors, and Attornies acting confidentially and professionally for
their

their clients; and he cited *Vaillant v. Dode-
mead* (a) and *Wilson v. Rastall* (b) (and the cases
there cited), where the Courts have laid it down
that the privilege is not to be extended by Judges,
however much, as men, they may lament the re-
striction.

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[RICHARDS, *Lord Chief Baron*. There is no
doubt that if a bill in Equity had been filed in this
Court or the Court of Chancery, for the purpose
of obtaining a discovery of this very document,
that the Court would have entertained it, and
have compelled the production of it, if it could
have been shewn to be such a document as would
assist the Defendant in proving the defence set
up to this action.]

Pell, Serjeant, and *Wilde*, in support of the
Rule, contended that the policy and principle of
the rule of law respecting privileged communica-
tions, applied as strongly to the case of master and
steward as to that of attorney and client; and
adverted to the impression (as reported) on the
mind of the learned Judge who tried the cause, as
an authority so far. They urged, that this case
was, in respect of the nature of the connection be-
tween the parties, very analogous with that of at-
torney and client—that it raised an entirely new
question on the already established principle re-
garding its application and extent, and one which
was *res nova*, and had not been at all approached

(a) 2 Atk. 524

(b) 4 Term Rep. 758.

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by any of the authorities, except in as far as they went to establish, by the analogy already mentioned, the proposition now contended for by the Plaintiff, that the witness was privileged from examination by reason of his confidential employment and relative situation in the Plaintiff's service. They distinguished the cases of private communications to personal friends, and secrets entrusted to medical attendants and advisers, with respect to whom the confidence was in each case merely collateral, and quite beside the reason and spirit of the principle of the rule of law, from the necessary confidence in respect of the subject-matter unavoidably reposed in the steward of a man of large property, which was immediate and direct, as in the case of attorney and client, and in respect of which nothing could be predicated of the one which would not be alike applicable to the other;—that it was for that reason nothing like the case of master and any other servant: that was the vice of the argument; for that relation approached nearer the unprotected and unprivileged communications between friend and friend, physician and patient, and served at once to illustrate the distinction now taken.

They pressed the mischief which a contrary principle would introduce in the administration of the law, and the insecurity of title and property, which would be the necessary consequence of holding that a steward was compellable to disclose his knowledge of his master's affairs on oath in a Court of Justice. They suggested, that to hold otherwise

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otherwise would be to enable any person to get at the latent defects in a title to real property by the aid of a fictitious and fishing action of ejectment, or of covenant, brought for the purpose of ransacking, through the medium of a steward, by means of his testimony extracted by a *subpœna duces tecum*, the contents of the muniment room of any person of great landed property.

They finally submitted that the principle on which the witness was not compellable to produce the document itself, was applicable equally to the question of obliging him to give evidence of its contents. From the natural imperfection of human memory, it would be better that he should be at once ordered to produce it. Still more objectionable was it that he should be compellable to state the effect of such a document, which might be a mere question of law. For these reasons, as well as on the principle of law respecting privileged communications, they insisted that the evidence of the witness ought not to have been received.

[The Lord Chief Baron left the Court, towards the conclusion of the argument of the Counsel who were heard in support of the Rule, to try the *Nisi Prius* Records in the Exchequer Chamber, but he had intimated a very strong and decisive opinion in the course of the argument, and on retiring.]

GRAHAM, *Baron*. I cannot bring myself to entertain any doubt upon this question in the shape in which it is now brought before us. The Lord Chief Baron was of the same opinion as myself,
 and

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and I have his authority for saying so, which I regard as a considerable sanction of my own. In order to judge of this question we must look to the real circumstances of the case on which it arises. This is not a case of a tenant disputing his landlord's title, but it is a defence (to an action brought on a covenant in a deed) by the party claiming under a representative, or, I should rather say, a derivative title, which defence is thus intended to be sustained. In effect the Defendant says, you, the Plaintiff, are a stranger; I, the Defendant, hold under a lease from a former Lord *Falmouth*, who being only tenant for life, his acts do not bind the remainder-man.

Let us suppose that in this case the party had proceeded in another way. I entirely concur with my Lord Chief Baron in this, that the occupier of this property, not being in the situation of a tenant to the Plaintiff—and therefore not a tenant disputing the title of his landlord, the person under whom he holds, but he insists that the Plaintiff is a mere stranger, and that he (the Defendant) derives his right not from the Plaintiff but from another person, thus altogether disclaiming all privity—might, without doubt, have filed a bill in Equity, stating that the Plaintiff had in his muniment room documents which, if produced, would shew that the Plaintiff's ancestor could not bind him by his acts. The only effectual answer that could be given to such a bill, which would avail to protect him from making discovery, would be, that he had no such document; for if he had, there is no doubt that a Court of Equity would have compelled the production

duction of it, on the equitable principle that it would be against conscience to permit him to suppress it.

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The case at present stands thus : the Defendant *Graham, B.* in this action of covenant served the witness with a *subpoena duces tecum*, or rather a notice to produce certain documents, from which it is said it will appear that the Plaintiff has no claim against the Defendant. Lord *Falmouth* may certainly rest on his oars and say, “ I will not produce any deeds which I have in my possession.” He is entitled to say so : but then the consequence of his remaining passive would be, that the Defendant then becomes entitled to call any one who may have seen such documents, and can prove that fact from their contents, and may examine him for that purpose. If the notice had been general and vague, and not confined to any specific deeds, it might not have been effectual perhaps ; but in this case the notice is framed to meet the Defendant’s case, and particularly mentions the deeds intended to be relied on, and which were to be found in Lord *Falmouth’s* chest.

I should be one of the last to decide rashly, I hope, a question of the importance which this was represented to be when put, as if it had involved the proposition that a steward would be bound to answer all questions asked of him respecting the title deeds of his employer. But this involves no such question. He is merely asked whether there is not a certain deed in Lord *Falmouth’s* possession

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sion which would shew that the title of his employer will not support the claim set up against the Defendant. That is a question which Lord *Falmouth* himself might be asked, by having recourse to the proper mode; and surely the steward cannot have any protection from the privilege of confidence in such a case where his employer himself could not withhold the information required. It is a mistake to say that here he has been interrogated as to the general contents of Lord *Falmouth's* chest of deeds; but simply and properly whether a predecessor of Lord *Falmouth* did not in his lifetime grant this lease; and whether, under certain deeds in Lord *Falmouth's* possession, that ancestor was not only tenant for life: and to that I cannot see any solid objection.

We are not therefore called upon to say whether a steward who should be asked general questions respecting his employer's title and the deeds in his possession, to which the steward must necessarily have access, would be protected from answering, lest he should injure his employer's interests. This is a matter which might have been asked of a stranger, or even of the attorney who prepared the draft, for he would be competent to be asked as to such a fact.

In this case I am clearly of opinion that the evidence was properly received; and when my Brother RICHARDSON says he admitted it with reluctance, that may be well so when the nature of the defence in support of which it was used be considered.

dered. But he did admit it, and I think he was right in so doing. It was for the Jury to say what was the effect of it. The lease has no signature by any remainder-man, or any one under whom the Plaintiff claims. Whatever might have been the effect of it, I am well satisfied that it was very properly admitted.

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WOOD, *Baron*. I entirely concur with my Brother GRAHAM and the Lord Chief Baron, who also intimated to us the same opinion before he left the Court to sit at *Nisi Prius*, having previously heard the substance of all the argument which has been offered to the Court.

In this action the Plaintiff, who is a remainder-man in fee, declared in covenant, on an indenture of demise, made by his ancestor for a term of years, and he therein assigns breaches committed in his own time. The Defendant has pleaded, as he had a right to do, undoubtedly, that his lessor was only tenant for life, and that therefore (he being dead) the lease was determined before the supposed breaches are alleged to have been committed. That is clearly a good plea: and upon that issue is joined. It has been said that a tenant is not to be permitted to scrutinize the title of his landlord, by means of examining witnesses in his landlord's confidence, as has been done in this case; but this is not an action by a landlord against his tenant, under a lease, in which case the Defendant could not plead *nil habuit in tenementis*. But where he has pleaded to an action of covenant such a plea as this, which
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makes an inquiry into the Plaintiff's title necessary to his defence, he surely may examine as to that plea, or where, as in this case, he raises the very question which is asked by the plea which he has put upon the record. If the plea were not proper, it ought to have been demurred to, but being here on the record, he may and must necessarily support it by the best evidence that he can procure.

Then the question arises on the evidence which he has examined in support of this plea. It is admitted, in argument, that the rule respecting privileged matters of confidence, does not extend beyond the case of Attornies and Barristers employed professionally. In this instance the witness is simply a Steward, and it is clear, therefore, that he can claim no privilege on the ground of being within the Rule as at present established, in respect of his being employed in either of those characters.

It happened in this case that Lord *Falmouth* had in his possession certain instruments which concerned the Defendant, and which, if he had the means of producing them, would make out his defence, and which, therefore, the Plaintiff might have been compelled to discover on oath. Having had notice to produce them, if he do not do so, then, undoubtedly, the Defendant would be permitted to give parol evidence of the contents of those instruments, for no doubt it is competent to him to do so, if he have given a notice to the party in whose possession they are, in terms sufficiently precise to point out what the instruments are
which

which he requires to be produced. If they are not produced, such notice having been given, lets in the party, claiming the advantage of them, to give parol evidence that such instruments are in existence. For greater caution, in the present notice, there is added a *duces tecum*. There is no doubt, therefore, that if they had not been produced, the Defendant might have examined the party having notice as to their contents. But, in fact, the instruments were produced, and that was certainly the best evidence which could be given. There was, therefore, no occasion to supply them by parol evidence of what they could have shewn.

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I see no sort of objection to the evidence which has been received on this trial of this issue. It stands on the footing of this plain rule, that where evidence making for one party is in possession of the other who has notice to produce it, if it be not produced, parol evidence may then be given. I deny that this was a case where the witness could not have been examined as to the contents of the instrument if he had thought proper not to have produced it. I am therefore of opinion that the evidence was rightly received.

GARROW, *Baron*. This case was said to be likely to present for our consideration a question of considerable importance and novelty, and so, perhaps it would have done had it been brought before us as we were led to expect; but as it is now put we may determine it on the authorities before us, and
 on

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on the broad principle on which the cases have been decided. In determining this case, as we are about to do, we abridge no privilege already existing, and we leave the general question untouched. All we have to do in this case, is not to extend the privilege of protection. The cases confine it to the instances of Counsel, Attornies and Solicitors, who have hitherto been held to be excepted, in respect of this privilege, from all the rest of mankind, and that, although the reason of it proceeds on the wisest possible grounds, because life, liberty and honour, being at once put to hazard, requires a general disclosure on the part of the client individual of all that belongs to their situation, in order to possess their advisers of the means of rendering them effectual assistance. The client is called upon to make his professional adviser, as it were, himself; and therefore such persons ought to be, and have been, held to be protected from answering questions which may tend to disturb the sacred trust reposed in them. Still, beyond those excepted persons the privilege has never been yet extended. Cases of the most deplorable hardship may arise, and very often do, and that argument has been much pressed. What can be a stronger appeal to the feelings on this question than the sensibly delicate situation in which men of the medical profession are so frequently placed, to whom communications of the most anxious kind must often be made, admitting of not a moment's delay, and frequently by the other sex, having the strongest claims on their confidence and fidelity: and yet, we have seen that, on authority,

thority, they are liable to be called on to disclose with bleeding hearts, the painful secrets which have been necessarily entrusted to them, and under the most distressing circumstances; but sacred as those communications must ever be held, the ends of truth and justice have been hitherto deemed paramount. Although I would not restrict the privilege, even in the shadow of a degree, wherever it shall be found to exist, the authorities are so very strong against all the attempts which have been made to extend it, that it would now necessarily require a very strong case, and much stronger than this to which our attention has been called by the present discussion. It is very much against the arguments which have been urged in favour of the privilege being possessed by persons in the situation of this witness, to know that, by the constant practice of Courts of Equity, such disclosures may be compulsorily obtained, even from the party himself, on whose account it is that the privilege, if any there be, of the class of persons to which the witness, now claiming it, belongs, by proceedings, with which, since I have sat in this court, I have become more habitually acquainted. The Defendant might have compelled the Plaintiff, by resorting to a Court of Equity, to have produced the deed which was the subject-matter of the examination of this witness, on the ground of its relating to the title of the Defendant; who therefore had such an interest in it as would procure to him the interference of a Court of Equity to compel the production of it. In this case the witness was asked on the trial, if he had
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such an instrument ; he admitted he had ; and if he had refused to produce it, it would have been a mockery if he could not have been examined as to its contents. Any stranger might certainly have been examined on the same subject, and for the same purpose, if they had happened to have seen and read it ; and I cannot, under the circumstances, consider that his being the steward of the owner of the estate, afforded him any protection from the examination. An arbitrator, on a reference before whom it had been produced, and who had taken a note of it, might have given evidence of it, if, after the notice, it had not been produced. An *amanuensis*, who might have been employed to transcribe it any time, or a private friend, to whom it might have been communicated in confidence, whilst partaking the hospitalities of his Lordship's table, that he had in his possession a deed which shewed that his uncle had only a life estate in the premises. All these persons might have been called to give evidence of its existence and contents. These instances are all confidences, more or less, and are only not protected because the parties do not come within the Rule, being neither Barrister, Attorney nor Solicitor ; and the witness in this case, the steward of the party, is in no better situation than any of the persons I have enumerated, and all would be obliged to answer the questions put respecting the facts of their knowledge, and such evidence would no doubt justify the Jury in finding as they have done. It is admitted that a person, in the situation of this witness would be compellable to give evidence of
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a parol communication, admitting the same fact; and why not, therefore, the contents of a document, to which, for greater certainty, he may, if he chuses, refer, to correct himself, if he should misstate it, when speaking of conversations in respect of which his memory may be less accurate.

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His Lordship concluded (after noticing the small amount of the damages) by adopting the words of Lord KENYON, in *Wilson v. Rastall*:—"I have always understood that the privilege of a client only extends to the case of the attorney for him; though, whether it ought to be extended further, I am happy to think, may be inquired into in this cause; for it is a matter of satisfaction to us that every step which we take, may be reviewed in another court if the Defendant chuse to tender a bill of exceptions; and therefore our opinion will not conclude the Defendant."

Per Curiam,

Rule discharged.

PHILLIPS and Another v. STEPHENSON.

SCLATER moved for a sequestration against the real and personal estate of the Plaintiff for non-payment of 132*l.* 5*s.* 8*d.* taxed costs upon the cer-

ment of costs taxed, is sufficient to found a motion for a sequestration, without any affidavit of demand and refusal to pay.


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K K

tificate

1822.

 Wednesday,
 27th November.


 The warden's certificate of a prisoner being in his custody for contempt for non-pay-

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tificate of the Warden of the Fleet, signifying that the Plaintiff "had been committed on the 6th inst. to his custody, and then remained a prisoner for (amongst other things) (a) his contempt in not paying the sum of 132*l.* 5*s.* 8*d.* costs taxed in this cause." The certificate was dated that day, *November 27.*

The Court, at first, were of opinion that an affidavit ought to be made by some person entitled to receive the amount of the costs, shewing that a demand had been made since the Plaintiff's committal, and that he still refused to pay the money; *28th November.* but upon being informed that it had been the practice, on former occasions, to grant a sequestration upon hearing the Warden's certificate read, without any affidavit, the Court made the order accordingly.

The following cases were cited from the Minute Book to that effect :—

MANTELL v. MARCHANT.

17th *Dec.* 1808.

JENKINS v. DAVIS.

7th *Feb.* 1815.

(a) Mr. *Phillips* was confined for debt in the gaol of *Carmarthen*, when the attachment and other previous process was issued against him; and on the first day of this Term he was brought up by writ of *habeas corpus cum causis* to the bar of the Court, and on his declining to pay the money was committed to the Fleet, charged with his contempt and with the other causes mentioned in the Sheriff's return.

DOE

DOE dem. BEANLAND and others v. HIRST (a).

1822.

Thursday,
28th November.

THIS was an action of Ejectment for Coal-mines in the Parish of *Bradford* and County of *York*. Upon the Trial at the *York Spring Assizes*, 1822, before *BAYLEY, J.*, the case appeared to be as follows. The coals in dispute consisted of a vein of low-bed coal, lying under a farm called *The Lower Busk Ing Farm*, at a depth of between forty and fifty yards below the level of a sough or water-gate, called *The Blackshaw Beck Sough*. They had been drowned in water until the year 1812, when, in consequence of the completion of a sough, called *The Annatt Hole Drain*, which, from the year 1793 up to that period, had been working at an expense of several thousand pounds, by *Joseph Woodhead*, and, after him, by *Aydon* and *Elwell*, with a view to drain some extensive coal-mines near to, but unconnected with the one in question, for the first time they became dry and capable of being gotten. In 1818 *Aydon* and *Elwell* began to sink for these low-bed coals, but, before reaching them, were discharged from proceeding any further by *Joseph Hirst*, who claimed them as heir-at-law of his father. *Aydon* and *Elwell*, upon this, took a lease of them from him at one hundred pounds per acre, and, under that lease, continued to get the coals for several years, paying *Joseph Hirst* his rent, and also paying to the tenant of the farm one guinea

New Trial of Ejectment granted under particular circumstances in evidence in the cause, notwithstanding the verdict of the Jury (for the Defendant) was in conformity with the direction of the learned Judge who tried the Action.— Costs ordered to abide the event.

As to what length of time, and what species of adverse possession, is sufficient to raise a presumption of grant in favour of the right to a good title in a register county; and what is insufficient to infer fraud, and what effect deeds under circumstances affecting their construction should have as evidence— see the facts of the Case.

(a) *Ex relatione.*

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a-year,

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a-year, as a compensation for damage done to the surface. Some time after *Aydon* and *Elwell* began to work these coals, they received notice from the owners of the estate that the coals belonged to them, but they paid no attention to such notice, and it was not repeated, although the owners of the estate were aware of the yearly payment of one guinea to the surface tenant. In the year 1816, *Joseph Hirst* died, leaving an only son, *Thomas*, his sole heir and devisee, who thereupon became entitled to the rent for these low-bed coals. In 1820, an action of ejectment was brought by *John Hirst* against *Aydon* and *Elwell* for recovery of these low-bed coals, which action *Thomas Hirst*, as their landlord, defended. On the trial of that cause, it appeared that *Joseph Hirst* was born before marriage, and, as such, incapable, although the eldest son, of being heir to his father, whereupon, on the father's death, the coals in question vested in his younger son, *Thomas*, who was born after marriage, and from whom, upon his death in 1802, they descended to the then Plaintiff as his only son and heir-at-law. Upon this evidence a verdict was found for the then plaintiff, who was, in the following term, put in possession of the low-bed coals under a writ of *Ha. fa. poss.* An action for mesne profits was then commenced by *John Hirst* against *Thomas Hirst*, which terminated in a reference at *Nisi Prius*, under which the arbitrators awarded a certain sum, and also ordered *Thomas Hirst* to give up to *John* a deed, bearing date the 3d December 1765, which they adjudged to be in

in his possession, and which was accordingly given up in the month of *June*, 1821.

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In *Michaelmas* Term, 1820, the present action of ejectment was commenced against *John Hirst* by the owners of the *Lower Busk Ing Farm* on the ground that the low-bed coals in dispute were a part of the inheritance, and had never been granted away. The cause was brought down for trial at the following *York Assizes*, but, from a mistake in laying the day of demise in the declaration, the Plaintiffs were nonsuited. In *June*, 1821, *Thomas Hirst* applied to *James Bottomley*, one of the lessors of the Plaintiff, for the deed of 1765, which was then in *Bottomley's* possession, in order to give up the same to *John Hirst*, pursuant to the award. With this deed *Bottomley* refused to part, and, therefore, in order to avoid an attachment for nonperformance of the award which had been moved for against him, *Thomas Hirst* agreed to purchase the *Lower Busk Ing Farm* at the price of seven hundred pounds, amongst the title deeds of which he received the deed of 1765. It was also agreed that no conveyance should be made of the estate until after the determination of the ejectment then pending, so that the parties on the record still continued the same, although *Thomas Hirst* became the only person beneficially interested.

In support of their title, the lessors of the Plaintiff produced the following deeds :

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21st and 22nd *October*, 1713. Conveyance to make a tenant to the *præcipe* and exemplification of a recovery suffered thereupon in Easter Term, 13th *Ann.* To the use of *Samuel Hulme* and *Mary* his wife, and their heirs, of (*inter alia*) certain lands, situate in *Revey*, in the parish of *Bradford*.

16th *April*, 1756. Will of the said *Samuel Hulme*, whereby he devised all his estates whatsoever and wheresoever, unto *Mary* his wife, and her heirs and assigns for ever.

30th *October*, 1766. Will of *Mary Hulme*, whereby she devised all her estates to trustees, therein mentioned, in trust, to sell the same as soon as conveniently might be after her decease, and apply the purchase monies as therein directed.

3rd and 4th *January*, 1780. Conveyance by the said trustees of (amongst others) the farm called the *Lower Busk Ing Farm*, situate in *Revey* aforesaid, to *Josiah Hotham*, his executors, administrators and assigns for the term of 2000 years, subject to redemption. Remainder to the use of *Joseph Hulme*, his heirs and assigns for ever; proviso for redemption, on payment of 600*l.* and interest by the said *Joseph Hulme* to the said *Josiah Hotham*, his executors, administrators or assigns, on a day therein mentioned.

24th *December*, 1782. Probate of the will of the said *Josiah Hotham*, whereby he gave all the residue

sidue of his goods, chattels, monies, securities for money, estate and effects, whatsoever, unto his daughter, *Susannah Hotham*, and appointed her sole executrix of his said will.

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30th *April* and 1st *May*, 1805. Indentures of lease and release; the release being of five parts, and made between the said *Joseph Hulme*, of the first part, the said *Susannah Hotham*, executrix as aforesaid, of the second part, *Elizabeth Bower*, of the third part, *John Bottomley* (from whom, in 1813, the said lessors of the Plaintiff had purchased the *Lower Busk Ing Farm*, although, standing upon the title of, their grantor, such conveyance to them was not given in evidence) of the fourth part, and *Joseph Beanland* of the fifth part, reciting as therein is recited. It was witnessed that, for and in consideration of the sum of 500*l.* to the said *Joseph Hulme* paid by the said *John Bottomley* as therein mentioned, the said *Joseph Hulme* did thereby grant, bargain, sell, alien, release, and confirm, unto the said *John Bottomley*, his heirs and assigns, the said farm called the *Lower Busk Ing*, together with the several closes thereto belonging; together with all and singular houses, out-houses, &c., *mines, quarries, minerals*, rights, liberties, and appurtenants, thereto belonging, or therewith usually occupied or enjoyed, "Saving always and reserving out of those presents so much and such part and parts of the coals, mines, and veins of coal and ironstone, lying and being under the surface of said closes, lands and grounds, thereinbefore mentioned, and intended to be thereby granted

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granted and released *as had theretofore been purchased by Joseph Hirst, of Clayton, in the parish of Bradford aforesaid, and Samuel Aydon, and William Elwell of Shelf, in the parish of Halifax aforesaid, ironmasters, of the said Joseph Hulme, and by him conveyed and disposed of to them, with the liberties and privileges appertaining thereto; under and subject nevertheless to the payment and performance of certain payments, covenants and agreements, on the parts of the said Joseph Hirst and the said Samuel Aydon and William Elwell, their heirs, executors, administrators, or assigns, to be paid, done and performed for or in respect of the said coals, mines, and veins of coal and ironstone, by them or some of them, purchased as aforesaid, such payments to be from time to time, and at all times hereafter, when and as the same shall become due and payable, made to and received by the said John Bottomley, his heirs and assigns."* And the indenture further witnessed that, for the considerations therein mentioned, the said *Susannah Hotham* bargained, sold, assigned, transferred, and set over, unto the said *Joseph Beanland*, his executors, administrators and assigns, all the aforesaid premises, to hold for the residue and remainder of the said term of 2000 years; in trust, nevertheless, for the said *John Bottomley*, his heirs and assigns.

Upon the preceding reservation being read, it was objected, that, unless explained away, it disaffirmed any title to the coals in the lessors of the Plaintiff, it being evident that some coals had
been

been previously conveyed by *Joseph Hulme*, which might be the very coals in dispute; upon which the Plaintiff's Counsel proceeded to answer that objection, and explain such reservation, by giving in evidence the following deeds:—

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16th October, 1727. Agreement between *Edward Bourne* and *Richard Pollard*, his tenant, of the one part, and *Nathaniel Priestley*, *Samuel Hulme* (therein described), and *Thomas Hirst*, of *Clayton Heights*, in the parish of *Bradford*, aforesaid, yeoman, of the other part: reciting, that the parties of the second part were severally seised of certain farms and lands, in the parish of *Bradford* aforesaid (amongst which the said *Busk Ing Farm* is particularized as being the estate of the said *Samuel Hulme*), under which a mine or vein of coals had lately been discovered to exist. And further reciting, that it appeared, upon casting level, by persons of skill and judgment in coal mines, that, by making a sough or watergate (which upon the trial was proved to be called *The Blackshaw Back Sough*) out at the north west corner of a close of the said *Edward Bourne's*, in the possession of the said *Richard Pollard*, commonly called *The Ing*, and driving it in the direction there specified, the said mine and vein of coals, in the lands of them the said parties of the second part, might be drained, and the coals therein be rendered capable of being got by proper pit-shafts to be made for that purpose. For the considerations therein mentioned, the said parties of the first part agreed to permit and suffer the said

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said parties of the second part, their heirs and assigns, agents, workmen and servants, to dig, mine and make, one sough or watergate, from the north-west corner of the said close, called *The Ing*, opening into a certain brook or watercourse there, and to drive the said sough in manner and in the direction therein specified; and for that purpose to dig, mine, and put down pit-shafts, and to do any act or thing in the lands and grounds of the said *Edward Bourne*, in the possession of the said *Richard Pollard*, needful for the purpose aforesaid.

10th *March*, 1728. Indenture tripartite between *Jonathan Priestley*, son and heir of the said *Nathaniel Priestley*, of the first part, the said *Samuel Hulme*, of the second part, and the said *Thomas Hirst*, of the third part, reciting the said agreement of 16th *October*, 1727; and also reciting that the said parties had agreed to become partners in the said coal-mine supposed to be in their respective lands and grounds therein mentioned. It was witnessed that the said parties did thereby, for themselves, their heirs, executors and administrators, severally, and not jointly, covenant, condescend and agree, to bear, pay and discharge, each of them, a third part of all charges, expences and disbursements, which should be required in the driving the said sough or water-gate from the north-west corner of the said *Edward Bourne's* close, called *The Ing*, through the several lands and grounds of the said parties, wherein they should be enabled to get coals, *by the level of the said sough or watergate*. And that, when the said coal-mine

coal-mine should be exhausted, and no more coals could be gotten in the lands and grounds above mentioned, by the level of the said sough or water-gate, then each of the said parties should bear one-third of the expence of filling up the pit-shafts, levelling the pit-hills, and reducing the lands and grounds of the said partners, into as good plight and condition as the same were at the time of making the said indenture.

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3rd December, 1765. Indenture tripartite between *Jonathan Priestley*, son and heir of the said *Jonathan Priestley*, of the first part, *Mary Hulme*, relict of the said *Samuel Hulme*, of the second part, *John Hirst*, and *Thomas Hirst*, of *Clayton*, within the parish of *Bradford*, aforesaid, merchants, the two only sons and devisees named in the last will and testament of the said *Thomas Hirst* (party to the deed of 1728), of the third part, reciting the before-mentioned deed of 10th March, 1728. And also reciting that the said coal-mine had been wrought, carried on, and kept on foot, by the said *Jonathan Priestley*, *Samuel Hulme* and *Thomas Hirst*, deceased, during their respective lives, and by the said parties to the now reciting deed since their death; and that the greatest part of the coals in the said indenture of 1728, recited to have been lying within the respective farms aforesaid, had been gotten and disposed of. And that the said *Mary Hulme* and *Jonathan Priestley*, were desirous to decline the said colliery, and to sell and dispose of their two-third parts therein. And also reciting that it had been agreed between the said parties thereto,

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thereto, that the said *John Hirst* and *Thomas Hirst* should and might at all times thereafter have the full and free use and enjoyment of the sough or drain, and all the old works belonging to the colliery or coal-mine aforesaid, or which might at any time thereafter be made by the said *John Hirst* and *Thomas Hirst*, for or in respect of the coals yet remaining ungotten in any of the farms or lands before mentioned, for loosing or draining any coals *which could be loosed by the said sough or drain*, and which they the said *John Hirst* and *Thomas Hirst* should or might choose to loose or drain through the same. It was witnessed that in consideration of the sum of 25*l.* 4*s.* to the said *Jonathan Priestley* and *Mary Hulme* paid by the said *John Hirst* and *Thomas Hirst*, the said *Jonathan Priestley* and *Mary Hulme* did thereby grant, bargain, sell, release and confirm, unto the said *John Hirst* and *Thomas Hirst*, their heirs, executors, administrators and assigns, their two-third parts or shares of all the mines, veins, and seams of coal lying and being in any of the farms or grounds aforesaid, of them the said parties to those presents, together with the full and free use of the mine, drain or sough, theretofore made and driven for the use of the said colliery or coal-mine for loosing or draining the said coals with, or any other coals which they the said *John Hirst* and *Thomas Hirst* might think proper to drain or loose by or through the same. "Such coal-bed or beds in the lands of them the said *Jonathan Priestley* and *Mary Hulme* hereinbefore particularly mentioned as are lying below or under the beds or
seams

seams of coal which have been heretofore wrought by the said *Jonathan Priestley*, *Samuel Hulme* and *Thomas Hirst*, deceased, or which now are or late have been wrought by the said parties to these presents or any of them, if any such lower bed or beds there be only excepted." The deed then contained several reservations of yearly payments by the said *John Hirst* and *Thomas Hirst* to the said *Jonathan Priestley* and *Mary Hulme* in the events therein specified and concluded by limiting the period, during which the *Hirsts* were at liberty to enter on the lands of *Priestley* and *Hulme* in order to dig pits, &c. to the term of twenty-eight years from the date thereof.

13th April, 1799. Articles of Agreement between the before named *Joseph Hulme* of the one part, and *John Crawshaw* and *Samuel Aydon*, iron-founders and partners, of the other part, whereby after agreeing that in consideration of the yearly and other payments therein mentioned, the said *Crawshaw* and *Aydon* might have liberty to get and carry away all the upper bed iron-stone within the several closes therein mentioned (of which the *Lower Busk Ing Farm* formed part); and also all the posts, pillars and supports of coal, within the same closes where the coal had been already gotten, and also all the black or upper-bed coal under the same closes; it was agreed that if the said *Crawshaw* and *Aydon* should at any time thereafter have an opportunity of getting the lower-bed coal in the said several closes of land or any of them, they should be at liberty so to do on payment

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ment of 50% per acre; and *Crawshaw* and *Aydon* thereby agreed to make reasonable satisfaction to the surface tenant for any damage arising from such works. To these several interests vested in the *Hirsts* and in *Crawshaw* and *Aydon* (who, in the year 1805, were represented by *Aydon* and *Etwell*) the Counsel for the Plaintiff then insisted that the reservation in the conveyance of 1st May 1805 solely referred; and, in order still further to negative the existence of any other grant of coal from *Hulme* to the *Hirst* family, they called the Deputy Registrar for the West Riding of Yorkshire, who proved that he had searched the office from its commencement down to the year 1805, and no such deed, except the deed of 3rd December, 1765, was registered; he added, on cross examination, that it was not usual to register grants of coal. They also called *Michael Stocks* who proved that his son-in-law, *Thomas Hirst*, had had the Defendant's title-deeds in his possession under the circumstances hereafter stated previously to the year 1820; that they had carefully looked through those title deeds previously to the ejectment brought against *Aydon* and *Etwell*, and that no such grant was to be found amongst them; and, moreover, that from his connexion with the parties he must have known of the existence of such a deed if it had ever been made, and he knew of none nor had ever heard of it. The attorney who prepared the deed of 1805, also stated that he introduced that exception, not from any knowledge of his own that such a grant had ever been made, but from information furnished him by *Hulme's* agent.

On

On inspecting the deed of 1st May, 1805, there appeared an erasure in the clause which excepted from that conveyance such coals as had been before purchased by *Hirst* and *Aydon* and *Etwell*: as read, the words were, “purchased by *Joseph Hirst* of *Clayton*, in the parish of *Bradford* aforesaid, and *Samuel Aydon* and *William Etwell*”; but it was obvious that some word had succeeded the word “aforesaid”, and had been erased, and the blank filled up with three asterisks. The Deputy Registrar produced the registered memorial of that deed, in which the word “maltster” succeeded the word “aforesaid”; and the Attorney who prepared the deed itself produced the draft of it, in which also was the word “maltster”, and swore that the erasure was not made at or before the execution of the conveyance. It was further proved that there never was a *Joseph Hirst* of *Clayton*, maltster, but that the father of the Defendant resided at *Clayton*, and was a maltster, and that *Joseph Hirst* lived at *Clayton*, but was not a maltster. It was also proved that *Joseph Hirst* was the guardian of the Defendant during his minority, and, as such, had the custody of all the Defendant’s title-deeds. That these, upon his death, came into the possession of his son, *Thomas Hirst*, who had married the daughter of *Michael Stocks*, in whose hands the deed of 1805 had been lodged as a pledge, some time previous to the year 1820. *Michael Stocks* swore that the deed was in the same state as at present when it first came into his possession.

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The Defendant called no witnesses.

BAYLEY, J. In summing up the case, after recapitulating the various facts above stated, told the Jury that the question for their consideration was, whether they believed that some other conveyance than those in evidence had actually been made, under which the Defendant would be entitled to the coals in question: that upon the deed of the 1st May, 1805, they would consider the circumstance of the erasure, observing that the man who was capable of making an alteration in one deed might be capable of suppressing another, if within his power.

The Jury found a verdict for the Defendant.

In Easter Term last, *Brougham* obtained a Rule to shew cause why that verdict should not be set aside, and a new trial had, on two grounds—first, that such verdict was against the evidence in the cause: and secondly, that the Jury had been misdirected.

Against this Rule, *Hullock*, Serj., was heard in the same Term, when the Barons requesting to have the deed of 1st May, 1805, produced before them, the case stood over for that purpose until this Term: and now *Williams* and *Starkie* also shewed cause. They argued, 1st. That, unless explained away, the exception on the face of the deed of 1805 disaffirms any title in the lessors of the Plaintiff

tiff to the low-bed coals in question. The exception refers to a grant of coals by *Joseph Hulme* to *Joseph Hirst*; but the parties to the deed of 1765, which it is contended such exception contemplates, is between totally different parties, and cannot, therefore, be the grant referred to. 2nd. That the agreement between *Hulme* and *Crawshaw* and *Aydon*, in 1799, passed the legal estate in the low-bed coals, and, consequently, that the lessors of the Plaintiff had not a sufficient interest to support an ejectment. 3d. That the whole case was so pregnant with fraud as to warrant the Jury in presuming that a grant of coals to the Defendant had been suppressed. 4th. That an adverse possession known to the lessors of the Plaintiff had existed since the time when the coals were first capable of being possessed; and although twenty years had not elapsed since such adverse possession commenced, yet there are cases where the Court have held a shorter time, when attended by other circumstances, sufficient to found the presumption. *Reeves v. Brymer* (a);— 5th. The non-registry of any grant does not affect the question; because the Deputy Registrar expressly stated that it was not usual to register grants of coal: besides which, the stat. 2 and 3 Ann. c. 4. was intended to protect only purchasers for a valuable consideration, which the lessors of the Plaintiff were not. Where was the consideration for the coals, which were proved to be worth 100*l.* an acre, when the purchase-money of the whole estate of the *Lower Busk Ing* was

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only 500*l.*? They also cited *Rex v. Long Buckby* (a), as in point, to shew the non-registry of the presumed grant.

Brougham, Tindal, and Alexander, in support of the Rule. 1st. The verdict was against evidence. All the evidence in the cause, both parole and documentary, went to negative the existence of any other grant from *Hulme* to *Hirst* than that of 1765; and although that deed was between parties different in name from those mentioned in the exception in the deed of 1805, yet the interests were the same. The *Joseph Hulme* who conveyed in 1805, was the son of the *Mary Hulme* who granted in 1765; and the *Joseph Hirst* mentioned in the deed of 1805, was the eldest son of the *Thomas Hirst* who was one of the grantees in 1765. The exception may, therefore, be construed as rather specifying the family than the individual. And this is rendered more probable from the same mistake having been made in excepting the coals actually granted to *Crawshaw* and *Aydon* as having been granted to *Aydon* and *Elwell*. Had the grant existed, it is but fair to suppose that some deed, or draft, or abstract, referring to or reciting it, would have been produced on the trial, but that was not the case. The evidence of *Michael Stocks* was strong upon the subject; and it is clear that it could not have been made before the year 1799, because, in the articles of agreement with *Crawshaw* and *Aydon*, made on the 13th April in that year, *Hulme* ex-

(a) 7 East, 45.

pressly

pressly asserts his ownership of the coals in question. But the evidence of non-registry is decisive of the point, and, although the Deputy Registrar stated that it was not usual to register grants of coal, yet that will have no weight, because, being interests affecting land, the stat. is express in requiring them to be registered. And they distinguished *Rex v. Long Buckby*, on that ground.

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But 2ndly they submitted that the Jury were misdirected in having it left to them to presume the grant of coal contended for:—1st. Because there was no sufficient proof of adverse possession whereon to found such a presumption. It is allowed on all hands that actual possession of these low-bed coals was physically impossible until the year 1812, when the *Annatt Hole Sough* drained them, so that the utmost possible extent of adverse possession cannot exceed eight or nine years, which according to all the cases is not even *prima facie* evidence of a right. And they cited *Doe d. Fenwick v. Reed(a)*, and distinguished *Reeves v. Brymer(b)*.

2ndly. Because the circumstance of an erasure in the deed of 1805, which was put to the Jury as a ground of presumption, was no ground whatever. The word “maltster” could not affect the lessors of the Plaintiff, whose title is totally unconnected with the *Hirst* family; and indeed it accords with the fact that there never was a *Tho-*

(a) 5 Barn. and Ald. 232.

(b) 6 Ves. 516.

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mas Hirst a maltster. It is therefore an immaterial alteration. But if it were ever so material, it could only affect the validity of the deed, and affords, in the present action, no more ground for presuming another grant than the erasure of any other word in the instrument would do. It ought not, therefore, to have been left to the Jury.

3dly. Because, even had the presumed grant really existed, still it would not have been valid against the lessors of the Plaintiff. The stat. 2 and 3 Ann. for registering bills and conveyances in the West Riding of the county of York, enacts that a memorial of all deeds and conveyances which, from and after the 29th September, 1704, shall be made and executed of or concerning or whereby any honors, manors, lands or hereditaments, in the said West Riding may be any ways affected in law or equity, may at the election of the party or parties concerned, be registered in such manner as thereafter directed. And that every deed or conveyance that shall at any time after any memorial is so registered be made and executed of the honors, &c. comprised or contained in any such memorial, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial thereof shall be registered as by that act is directed, before the registering the memorial of the deed or conveyance under which such subsequent mortgagee or purchaser shall claim. Now, the deed of 1765, in which the low-bed coals are expressly reserved, was registered;

—in

—in 1805 *John Bottomley*, under whom the lessors of the Plaintiff claim, purchased for a valuable consideration and his deed is registered;—and between those two periods no memorial of any grant of coal from *Hulme* to *Hirst* is found to be enrolled in the Register Office. Such a deed, therefore, even if existing and produced in Court, would have been invalid against the lessors of the Plaintiff, and therefore the Jury should not have been directed to presume it. It has been objected that *Bottomley* was not a purchaser for a valuable consideration, but the contrary will be manifest when it is considered that, at the time of his conveyance, which, subject to the exception, expressly conveys all “mines, quarries, minerals, &c.” it was still problematical whether or no a low-bed of coals actually existed, for the deed of 1765 speaks of reserving them, “if any such there be”; and when it is still further considered that, in order to drain off the water, several thousand pounds must necessarily have been expended in driving a sough, had not the *Annatt Hole Drain*, which was proved to have cost that sum, accidentally produced the effect. That the agreement between *Hulme* and *Crawshaw* and *Aydon* in 1799, was only a license, and passed no legal estate to the latter persons, is proved by the case of *Doe d. Handley v. Wood(a)*.

1823.

 DOE dem.
 BRANLAND
 and others
 v.
 HIRST.

Per Curiam. Without entering at all into our reasons, we think it sufficient to say, that this Rule for a New Trial must be made absolute; the costs to abide the event.

Rule absolute.

(a) 2 Barn. and Ald. 724.

LILLEY

1822.

Tuesday,
28 Nov.

Pleading.

LILLEY and others, (assignees of Bankrupts,) v.
HEWITT.

[Demurrer.]

It is not necessary, in a declaration against a person on his undertaking to be answerable for or to pay the debt of another, to state an agreement, note, or memorandum, or the terms of any such, or the parties thereto, or that it was in writing or signed by the defendant: nor is it necessary to do so in the replication to a plea, averring that no agreement or note or memorandum stating the consideration in writing, signed by the defendant, was stated or shewn. Such a plea held bad on special demurrer; notwithstanding the case of *Saunders v. Wakefield*, 4 B. & A. 595.

THE Plaintiffs declared as assignees of Bankrupts in special assumpsit, stating, that the Bankrupts before, &c. were in partnership as Bankers. The Declaration alleged, that one *Benjamin Kelsey* had opened an account with the Bankrupts as such bankers in which they were in advance to him, and that they were about to close the account, unless *Kelsey* should give them security; that, in consideration of the premises, and in consideration that the said [bankers], at the special instance and request of the Defendant, would not close the said account, but would continue to make advances to *Kelsey*; the Defendant undertook, and then and there faithfully promised the said bankers to be answerable to them for such sums as they *had advanced* or should advance to *Kelsey* to the extent of 200*l*.

The Plaintiffs then averred, that the said bankers, confiding, &c. did not close the account, but on the contrary, kept and continued the same an open account, and continued to make such ad-

It is not matter of objection to such a declaration, that the consideration for such collateral undertaking as set out is inadequate; for it is not necessary to state a full and adequate consideration to maintain *assumpsit* on the promise and undertaking. A good and valuable consideration in law is all that it is necessary to state for that purpose.

Therefore, if the undertaking were to be answerable for and to repay money advanced and to be advanced, to a limited amount to the third person, it cannot be objected that the money already advanced was an insufficient consideration to ground the undertaking.

It is not necessary in such a declaration to aver a request made to the party himself, in the first instance, to pay the debt before the guarantee was resorted to: at least an averment, that he had neglected and refused to repay the money, is sufficient for the purpose of maintaining the action against the guarantee.

vances

1832.



LILLEY
and others.
v.
HAWLEY.

vances to *Kelsey* thereupon, to the amount of 200*l.*; and that 200*l.* became due and in arrear from *Kelsey* to [the bankers] upon the balance of such account: and that although a reasonable time for the payment by *Kelsey* had elapsed, &c. (averring nonpayment and neglect *and refusal to pay by Kelsey*, of all which premises the Defendant then and there had notice)—Breach—refusal by the Defendant *although requested*, &c. to become answerable to or to satisfy the said bankers or the Plaintiffs the said sum of 200*l.*, or any part thereof, &c.


A second count stated the consideration of the collateral undertaking of the Defendant to be answerable for sums advanced, and to be advanced to *Kelsey* within the amount of 200*l.* to be forbearing to close the account, and continuing to advance money to *Kelsey*; and averred that the Bankrupts continued to advance sums, amounting to 200*l.*; and that *Kelsey* did not, but refused to pay, &c.

A third stated a promise by Defendant, in consideration of the banker's *lending and advancing money to Kelsey* at the *special instance* and request of the Defendant, to be answerable to them to the extent of 200*l.*

A fourth count laid the undertaking on the part of the Defendant to be, to repay the money advanced to *Kelsey*, if he did not in consideration of the bankers lending money to *Kelsey*, at the request of the Defendant.

The

1893.


 LILLY
 and others
 v.
 HEWITT.

The Declaration also contained the common counts, for money paid, lent, had and received, and account stated.

The Defendant pleaded the general issue: and as to the four special counts—*Actionem non*;

1st. Because each of the said several promises and undertakings therein respectively mentioned were special promises *to answer for the debt of another person*, to wit, *Kelsey*, and *that no agreement* in respect of or relating to the cause of action in those counts respectively mentioned, *or any memorandum or note thereof*, wherein the consideration for the special promise in those Courts respectively mentioned *was stated* or shewn, or was *in writing or signed by the Defendant* or any person by him authorised.—*Par. ver.*—Praying Judgement.

There were two other pleas differing only in that the second stated the special promises and undertakings to be for the *default* of another: and the third for the *miscarriage* of another.

Replication—taking issue on the first plea: and, to the other pleas in bar—*Precludi non*; because (*protestando*) an agreement in respect of and relating to the cause of action in the four special counts respectively mentioned, wherein the consideration for the special promise was stated and shewn, and was in writing, and signed by the defendant.—Concluding to the country.

As

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As to so much of the replication as purported to be pleaded by way of reply to the special pleas in bar whereof the Plaintiffs tendered an issue, the Defendant joined issue : and as to the residue demurred ; for that, although the Plaintiffs, in their said replication as to the special pleas, had alleged that there was an agreement in writing, &c. ; yet they had not in their replication disclosed to the Court the names of the parties to the said agreement : nor stated the terms on which the said agreement was made, nor the substance and effect thereof : and that the said replication was informal and insufficient.

Joinder in demurrer.

Manning, in support of the pleas and demurrer, insisted, in the first instance, that the declaration and replication were bad. The objections particularly taken to the ground of action disclosed in the first and second counts of the declaration, and stated in the margin of the paper book, were these :

1st. That in the first count it was stated that the Defendant undertook, &c. to be answerable to the Bankrupts for such sums as they had already advanced to *Kelsey*, whereas no *sufficient* consideration appeared to support that undertaking.

2dly. That though the consideration that the Bankrupts would continue to make advances to *Kelsey* was sufficient to support a promise to pay such

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 and others
 v.
 HAWES.

such future advances, yet, inasmuch as it did not amount to an engagement on the part of the Bankrupts to make any further advances at all, it could not be a good consideration to support a promise to pay an antecedent debt.

3dly. That it did not appear whether the sum alleged to be due, consisted of debts contracted before or after the Defendant's promise.

4thly. And that it did not appear that the previous advances for which the Defendant was supposed to have undertaken to be answerable were made at the request of the Defendant.

To all the special counts it was objected that it was not stated that *Kelsey* was ever requested to pay the balance due from him.

The objections taken to the replication, and assigned for causes of demurrer, were, that the supposed agreement in writing was not set out in the replication, whereby the Court were unable to determine upon the sufficiency and legal effect of the instrument.

2dly. That it did not appear who were the parties to the supposed agreement: and

3dly. That it did not appear whether *Kelsey* was or was not a party to it.

All these objections to the declaration were
 submitted

submitted to be objections, not of form merely, but of substance ; and that therefore it was competent to the Defendant to make and insist on them now notwithstanding he had pleaded over.

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 LILLEY
 and others
 v.
 HEWITT.

The principal authority relied on in support of the demurrer and the pleas was, that of the Court of King's Bench in a recent determination on a case of *Saunders v. Wakefield*(a), wherein that Court—who delivered their opinions *seriatim* at considerable length after argument of a similar question raised on demurrer to a replication, like the present, averring in answer to a plea in precisely the same words that the agreement there was in writing, and signed by the Defendant, and also setting out the terms of it—held that the plea was good, and the replication bad : and they proceeded upon the proposition that the special promise should be in writing, and that the consideration should be stated, for otherwise the action could not be maintained, because to make a special promise, a consideration must appear, and it could not be shewn by parol evidence at the trial, without letting in all the mischief which the Statute of Frauds was passed to prevent. He submitted therefore that the action could not be supported upon the declaration as framed, which was altogether bad ; and that the replication was liable to the objections that had been raised by the plea and demurrer. He stated that the Chief Justice of the King's Bench had observed

(a) 4 Barn. and Ald. 595. And see the numerous cases there cited.

(which

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(which did not appear in the Report) in giving Judgment in the case of *Saunders v. Wakefield*, that the agreement ought to have been stated in the replication, that the Court might be enabled to judge of the legal effect of it.

Tindal, for the Plaintiff, was stopped by the Court.

Per Curiam,—There must be Judgment for the Plaintiff.

They unanimously held that the declaration and replication were not objectionable for the causes of demurrer assigned, nor demurrable on the ground of any of the objections which had been raised.

Wood, Baron. Expressed his opinion on these pleadings to the following effect :

These pleas, I must say, appear to me to be altogether new. For my part, I have never before met with, nor did I ever hear of such pleas as a bar to an action of this nature, nor, I will venture to say, did any one else. In the only case which has been cited in support of this demurrer (*Saunders v. Wakefield*), it does not appear that the attention of the Court was called to the objections to which I consider these pleas are liable. I am quite sure that they cannot be supported on any sound principle: and it is impossible to believe that the Court of King's Bench would have approved of such pleas if they had been brought
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under their notice in the case to which we have been referred in support of them.

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HEWITT.

Wood, B.

In order to be convinced of the vice of this system of pleading, we have only to look to the evil consequences which would necessarily follow from adopting or allowing it. If we were to hold it to be necessary for a Plaintiff to set out in his declaration every circumstance of such a case as it would be necessary for him to prove to take his cause of action out of the Statute of Frauds—as if where he sues on a promise to pay the debt of a third person, he should be required to set out the note or memorandum on which the Defendant's liability is founded, with its terms and incidents, upon the record—what an obstruction it would be to the course of administration of justice! We know very well from experience that actions of this nature are very often only capable of being supported in fact on evidence furnished by the tenor and result of a long correspondence, which may have taken place between the parties on the subject, and the Plaintiffs' case rests entirely upon an undertaking on the part of the Defendant, which is to be collected from the constructive result of, at least, several letters, the inference from which should be left to the consideration of a Jury. If those letters were necessarily to be stated in the declaration, and the inference to be deduced by the Pleader, what difficulties would be imposed on Plaintiffs who had to make out a case not within the statute, if an omission of any one circumstance necessary to take it out

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and others

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Wood, B.

out of the statute, might be pleaded in bar. Instead of having consultations of Counsel, as is now usual at the Assizes only, to prepare for an arduous trial by advising on the mode of bringing forward the case of the party, it would become necessary to have a consultation before a Declaration is filed or a Plea put in, if such pleas as these were good for any thing, in order to advise, when the pleadings are put in, what evidence shall be disclosed and set out in the replication, as that on which they will rely at the trial, so as to exclude all other testimony. The next plea to be attempted, I presume, will be on another section of the Statute of Frauds, and will be that the contract is for sale of goods for ten pounds and upwards, and the Defendant did not accept part of the goods, and actually receive the same, nor did he give any thing in earnest to bind the bargain, nor in part of payment, and there was no note or memorandum in writing, signed by Defendant or his agent: and then it will be contended Plaintiff must set out in his replication which of the alternatives he means to give in evidence. I foresee that so much inconvenience will result from allowing these new inventions, and they are so contrary to all principles hitherto established, that I cannot help thinking these pleas are bad. Then what would be the condition of our records in such cases? What endless prolixity and perplexing intricacy would they be involved in; and to what length would they often be run, if all that it were necessary to prove on the trial of the cause were as necessary to be stated in the pleadings. There are many
other

other cases wherein it would be necessary to state circumstances to take them out of the Statute, to which the same objection would apply.

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Amongst the ancient lawyers such a style of pleading would never have been thought of, and I am quite sure that no such plea was ever put in in practice on any occasion from the 29th of Charles II. when the Statute of Frauds and Perjuries was made, down to the second year of his present Majesty, which is a strong proof that former lawyers never thought such a plea could be supported. I am therefore of opinion that these pleas are bad.

I will now consider the objections which have been taken to the declaration, and which, I think, have no solid foundation. The first is that which is, in effect, stated in the plea, that it does not set out the terms of the agreement. Now the rule of pleading I have always understood to be this: whenever the declaration is framed upon a deed, it must be pleaded with a profert to enable the Defendant to crave oyer and prepare his plea; but if the Plaintiff declare on an agreement in writing signed, but not under seal, he need not state it in the declaration to be in writing or to be signed: and the reason is because he is not obliged to make profert of it, nor can the Defendant demand oyer, or a copy of it. It is considered as a simple contract. It is necessary, however, that he should prove it at the trial, but that does not oblige him to set out the terms of it in his declaration: and it is sufficient if he set out enough of the
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tenor of it to shew that he has good cause of action. I consider this demurrer merely a novel and ingenious attempt to oblige the Plaintiff to set out the whole of his case on the record as it must be proved by the evidence on the trial. If it were necessary to do so whenever the Statute of Frauds applies to a cause of action or defence, it would contravene all the established rules of pleading. To Plaintiffs particularly, it would be a monstrous inconvenience, if they were required to set out in their pleadings all the solemnities which this or any other Statute may have made necessary to give validity to any transaction, and which it has been always considered sufficient to prove at the trial. Evidence is not set out in pleading on the record. The proper cognizance of that belongs to the Jury, in the first instance ; although the Court will grant new trials when Juries, in the judgment of the Court, find verdicts contrary to evidence, or upon insufficient proof. I remember seeing a declaration settled by the late Mr. *Wallace*, the most eminent and able pleader of his time, in which an undertaking was stated to be "in writing". He struck it out, and wrote "it need not be stated in the declaration, the solemnities of the Statute of Frauds are only applicable to evidence." On these grounds I am of opinion that, as the declaration furnishes ample notice of the nature of the Plaintiff's cause of action, there is nothing in that first and principal objection which has been taken to it.

I consider also that the objection which has been
made

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Wood, B.

made against the sufficiency of the consideration stated, in respect of the undertaking of the Defendant, is also quite untenable on any principle of law or reason. The Bankers require to be furnished with security for the money due and to become due to them, otherwise they would withhold their advances, and afford no further accommodation, nor give any longer credit; but, in consideration of the promise to pay what was then due and any further advances to a certain amount they continue to keep open the account. Now I take that to be good consideration for this undertaking to pay money already advanced and to be advanced. To found an assumpsit it is sufficient to state a good consideration, whether it be full and adequate or not, and here the Plaintiff has stated what amounts to a good and valuable consideration in law.

The next objection is, that it is not averred in the Declaration that either the Bankrupts or the Plaintiffs had ever made any request to *Kelsey* (the principal) for repayment of the money advanced to him by the Bankrupts before the Plaintiffs called on the Defendant, the surety, to pay them the debt. The Plaintiffs certainly do not aver in terms that they ever made any such request to the principal, but they allege that he neglected and refused to pay the money, and that the Defendant had notice and was requested to pay, and that is surely quite enough, even supposing it were necessary that such request should be previously made before the Plaintiff's right of action against the Defendant accrued.

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and others
v.
HEWITT.

Wood, B.

The only remaining objection is, that it does not appear that the previous advances were made to *Kelsey* at the request of the Defendant, and that it does not appear how much money was advanced before and how much after the Defendant undertook and promised. I do not consider that it was by any means necessary that that should appear on this record when the Declaration alleges that the Plaintiffs undertook to be answerable for all money within the restricted amount which should be found due on the final balance of the account between them and *Kelsey*.

The pleas therefore being all bad, and the objections to the declaration and replication being without foundation, the Defendant must go to trial on the general issue.

Per Curiam (a),

Upon this demurrer there must be

Judgment for the Plaintiff.

(a) Mr. Baron Graham was not in Court when the Judgment was given, but the Court had considered the case amongst themselves before the learned Baron had left the Bench, and he expressed on retiring his full concurrence in the opinion which would be delivered.

1822.

Saturday,
23d November.

DOE *ex dem.* INGRAM v. ROE.

PARKE, on the 16th *November*, obtained a rule on the part of a person claiming title as landlord to the premises which were the subject-matter of this ejectment, calling on the Lessor of the Plaintiff to shew cause why the Judgment, which had been signed against the casual ejector in this case, should not be set aside on payment of costs. That rule was afterwards enlarged and amended by a subsequent order of the Court, requiring (on the authority of *Doe dem. Troughton v. Roe(a)*) the tenant in possession to shew cause why she should not pay the costs of signing the judgment sought to be set aside, and also the costs of this application, upon affidavits shewing that she had neglected to apprise the landlord of the proceedings.

A Judgment in Ejectment against the casual Ejector set aside after Judgment executed, and possession delivered up to the lessor of the Plaintiff, on the ground that there had been no notice given to the landlord by the tenant in possession of the proceedings, and consequently no trial of the merits—on the terms of the landlord paying costs to the lessor of the Plaintiff, and the possession to be in the mean time retained by the latter.

Jeremy new showed cause on the part of the lessor of the Plaintiff, insisting that the rule ought not to be made absolute in this case, because the Judgment had been executed, and the possession had been actually changed, distinguishing the present case by that circumstance from that which had been adverted to on obtaining the rule.

Rule calling on the tenant in possession to show cause why she should not pay the costs of signing the Judgment, and of the application to set it aside discharged.

Jones, showing cause on behalf of the tenant in possession, contended that there had not been a sufficient case of collusion made out against her to found the extraordinary proceeding of ordering

Seemle the proper remedy in such case is by action against the tenant in possession, if there have been collusion.

(a) 4 Burr. 1996.

1822.

DOE
ex dem.
INGRAM.
v.
ROE.

her to pay the costs. The power of the Court to do that, he observed, rested solely on the authority of the case in *Burrow*, and there the tenant had submitted, admitting himself to be in fault. He therefore urged that the rule ought to be discharged as against her.

Parke, in support of the Rule, relied upon the authority of the case of *Doe dem. Troughton v. Roe* wherein the Court distinctly held that the possession ought not to be changed where there had been no trial.

The Court held that, under the circumstances, there having in point of fact been no trial, the Judgment ought to be set aside to give the landlord an opportunity of trying the question, upon payment of costs to the lessor of the Plaintiff; but they did not consider the case sufficiently strong to warrant an order for re-delivery of possession.

They also determined that there was not a sufficient case of collusion made out against the tenant in possession to order her to pay the costs, even if they could do so in this summary way; for that if the landlord could show that there had been a collusive neglect on the part of the tenant to give him notice of the proceedings, his proper remedy would be by action against her.

They therefore

Ordered that the Rule be discharged as far

as regarded the Tenant in possession, with costs to be paid by *Jackson* to the lawful Plaintiff, and that *Jackson* (the Applicant) be at liberty to appear and defend the action as landlord, but without altering the present possession of the premises in question.

1822.

DOE.
ex dem.
INGRAM.
v.
ROE.

GRIBBLE v. CARPENTER.

1822.

Thursday,
26th Nov.

BAILEY made a *motion*, the object of which was, to carry into effect an arrangement entered into between all the parties interested in this cause, for the purpose of putting an end to it, with the consent of all parties; but

The Court refused to entertain the application, not only because the consent of all parties was not sufficiently shewn; but because it was properly a subject matter for petition, and could not be effected by the summary course of motion.

Nil.

WELLINGS and another v. MARSH.

1822.

Thursday,
28th Nov.

THE Court would not receive the justification of bail (by affidavit) in this case, because the names of all the Deponents were not inserted in the jurat, pursuant to the rule of practice(a), re-

Bail (by affidavit) rejected because the name of each Deponent was not inserted in the jurat of the affidavit.

(a) Vide ante Vol. VIII. p. 501.

quiring

1822.

DOE
ex dem.
INGRAM.
v.
ROE.

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1822.

DOE.
ex dem.
INGRAM.
v.
ROB.

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(a) Vide ante Vol. VIII. p. 501.

quiring

1822.

WELLINGS
and anotherv.
MARSH.

quiring that that should be done in all cases, and on that ground the bail were

Rejected.

1822.

Thursday.
28th Nov.

BAGNALL v. UNDERWOOD.

It is not necessary that a party applying for an order upon the Master to review his taxation of costs should first pay into Court the amount of the items in the bill of costs to which no objection has been made.

A charge for a document tendered but not received in evidence, cannot be supported.

The charges allowed for the attendance and expenses of witnesses must depend on the circumstances of the case. It is not because some of those who have been subpoenaed are not examined that they are not to be allowed for in taxing costs.

PULLER on the part of the Plaintiff shewed cause against a rule which had been obtained by *Taunton* that it might be referred back to the Master, to review his taxation of the costs in this cause, which was an action for a libel, wherein the Defendant had charged the Plaintiff with embezzlement. The rule had been granted on the ground that the Master had allowed a charge of 5*l.* 9*s.* for a copy of the record of an indictment, preferred by the Defendant against the Plaintiff at the quarter sessions of the peace for the alledged embezzlement, which the learned judge who tried the cause had refused to receive in evidence, holding it to be inadmissible, and it was not made use of upon the trial; and also that he had allowed the expences of eight witnesses, two only of whom had been examined.

He first submitted that the application could not be entertained, till the party applying should pay into Court the sum taxed in respect of the charges, to which there had been no objection made. He then contended that the Master had not done wrong in allowing the charges objected

to;

to; because, although the document had not been used, it might have been necessary to have shown the malicious motive of the Defendant: and that the witnesses who had not been examined, would have been necessary if certain pleas of justification had been attempted to be supported.

1822.
BAGNALL
v.
UNDERWOOD.

Taunton, in support of the Rule, denied that parties applying for an order on the Master to review his taxation ought previously to pay into Court the amount of the items not objected to; and he insisted that there was no such rule in practice.

He insisted, that in an action for libel, the indictment could not be received in evidence for any purpose: and he contended, that the only criterion for allowing the charges for the attendance of witnesses subpoenaed was, that of their having been actually examined.

Per Curiam,

Without saying that the indictment could not have been received in evidence for any purpose, or that it is necessary that all the witnesses attending on subpoenas must be examined, in order that their attendance and expences may be allowed in taxing costs, we are of opinion that this taxation must be reviewed. When two witnesses have in fact been examined, there appears to have been no necessity for the other six, and some of them were subpoenaed to prove facts which this Court

1822.

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v.
UNDERWOOD.

Court has determined that it was not necessary to prove, because the libel itself stated and proceeded on those facts, assuming them to be true.

The Rule, therefore, would in that respect have been made

Absolute;

But it was discharged on the Plaintiff agreeing to allow 5*l.* to be taken off.

1822.

Thursday,
28th Nov.

RABY v. OLARENSHAW and another.

It is necessary to give the opposite party notice of an application intended to be made to discharge a Rule *Nisi* for an order of the Court. That species of Rule is in practice peculiar to this Court, and in this respect differs materially from the ordinary rule to shew cause.

PRICE, for the Plaintiff, moved that the Rule *Nisi*, which had been obtained by *Sir W. Owen* in this Case, on the 23d instant, whereby it was ordered that the Plaintiff pay to the Defendants' Costs to be taxed by the Deputy Clerk of the Pleas, for that he did not proceed to trial pursuant to notice, "*UNLESS cause should be shewn to the contrary, on Thursday the 28th day of November next*"—might be discharged; upon an Affidavit stating certain facts as good cause why the Plaintiff had not proceeded to the trial of the Cause according to his notice; and negating laches.

The Court referred to the Officer respecting the course of proceeding in such cases. He reported that the Practice in discharging Rules *Nisi* in this Court, required that the applicant should give the opposite

opposite party previous notice (a) of his intention to shew cause, in order to obtain a discharge of the Rule, lest he should be taken by surprise without having had any opportunity of seeing the affidavits filed in opposition to his Rule, so that he might not be prepared to support it.

1822.
RABY
v.
OLARENSHAW
and another.

They therefore refuse to hear the Affidavits, but they enlarged the Rule till the 1st day of the next Term, in order that the exigency of the Rule of Practice might be satisfied in the meantime, by giving the necessary notice.

Rule Enlarged.

(a) The officers did not agree as to the time of notice necessary to be given in cases of this sort, or whether it might not be less than two days.

END OF MICHAELMAS TERM.

Gray's Inn Hall.

SITTINGS AFTER MICHAELMAS TERM.

1822.

Monday,
9th December.

Coram RICHARDS, Lord Chief Baron.

ROBERTS v. WEST.

Practice.
A cause standing in the paper of the day, and being about to come on to be heard at the Sittings, the Court nevertheless granted a motion for transferring it to a future day in the following Term, and that a Cross Cause should be advanced in the paper, to be heard at the same time.

But they imposed on the party applying the terms of paying the costs of the day.

JERVIS and *Roupell*, on the part of the Defendant, moved that this Case, which was in the paper for to-day, should be placed in the paper for the first day of causes in Hilary Term; and that the Cross Cause of *West v. Roberts* should be advanced in the paper, and that it might be heard at the same time.

Martin and *J. Martin*,—having ineffectually opposed the motion, on the objections that it should have been made before, and that the Defendant ought not to be permitted, after having suffered the cause to be in the paper, to make such an application just as it was coming on—then applied for the costs of the day, on the ground of the cause having been in the paper; and the CHIEF BARON, after some hesitation and communication with the Officers, determined that it was reasonable, and therefore,

The Motion was Ordered.—

The Plaintiff to pay the costs of the day.

Present—

Present—WOOD and GARROW, *Barons*.

1822.

FOREMAN and another, Assignees, &c. v. COOPER.

Saturday,
14th December.

THIS was a suit instituted by Assignees of a Bankrupt, who was Lessee of the Vicar, for Tithes, against an occupier.

A Plaintiff in a Tithe Cause, Lessee of a Vicar, ordered on motion on the part of the Defendant to bring in and deliver to his Clerk in Court, books, papers, &c., stated in affidavits to be in his possession, and to belong to the Vicar, who was not a party to the suit.

Jervis, for the Defendant moved, that the Plaintiff *Foreman* might be ordered to deliver to *Michael Dickson* (the Vicar), a witness for the Defendant, certain books and papers belonging to *Michael Dickson* as Vicar, and by him delivered to Plaintiff, and now in Plaintiff's custody (as stated in certain affidavits); or to leave the same within ten days with the Plaintiff's Clerk in Court, and that Defendant might be at liberty to inspect and take copies in the usual manner, and that the Plaintiff's Clerk in Court might be directed to produce the said books and papers before the Examiner, for the purpose of being proved, and that the said Clerk in Court might produce the same at the hearing.

This application was founded on affidavits, on the part of the Defendants, stating that one of the Defendants had applied to *Dickson* for the above documents, and was thereupon informed by him, that they were in the possession of the Plaintiff *Foreman*, to whom he had lent them, and to whom the Defendant had also applied for them, with the permission and authority of *Dickson*, and that

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FOREMAN
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v.
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that *Foreman* had refused to deliver them up, and that they were necessary to the Defendant's defence. The other Deponent stated, that a joint commission to examine witnesses had been returned executed, under which *Dickson* had been examined on the part of the Defendant, and the usual order to pass publication had been served by the Plaintiffs; that *Dickson's* examination was imperfect, because he had not had his books, &c. to refer to at the time; and that in consequence, publication had been enlarged till the first day of Hilary term next.

Pepys opposed the motion, on the grounds of the lateness of the application: and as being altogether novel, and out of the ordinary course, that—on the alleged statement of the Vicar, who was not a party to the cause, he had lent the Plaintiff such books, &c., generally, without saying what they were, or the nature of the documents—a *motion* should be made for an order that he should deliver them up, which was rather matter for a bill of discovery. And he also urged that the motion made could not be enforced if granted, for want of the usual specification of the books, &c. sought, which was always considered indispensably necessary in such cases, as otherwise the party could not be brought into contempt. Besides in the mean time he might deliver them back to the owner if he had any such books and papers; but

The *Court* made the Order, founding it upon the peculiar circumstances and nature of the case;
observing,

observing, that if the Plaintiff had no such books in his possession, he might shew it, and he would not in that case incur a contempt: and, if he had delivered them up, it would be an answer to the application.

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Ordered.

END OF SITTINGS AFTER MICHAELMAS TERM.

REPORTS
OF
CASES
 ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER
AND
EXCHEQUER CHAMBER.

HILARY TERM,
 3 AND 4 GEO. IV.


In the Exchequer Chamber.

[CROWN CASE REFERRED TO THE JUDGES.]

1823.


 Wednesday,
 29th January.

The KING (on the Prosecution of the Governor
 and Company of the Bank of *England*) *v.* JOHN
 WAIT.


Evidence.
 Where the
 Prisoner was
 indicted for
 forging a pow-
 er of attorney to transfer stock, to which he had affixed his own name and that of a co-
 trustee, in whose names the stock stood in the Bank-books, the co-trustee (who on hear-
 ing of the transaction had apprised the Bank of the matter by letter, and had thereby
 prevented the transfer) is admissible and competent as a witness to prove the forgery.

THE prisoner had been tried at the Old Bailey
 Sessions, on an indictment charging that he “ fe-

It is not necessary that a Power of Attorney given by Deed should be revoked by Deed.

* * The objection to the admissibility in evidence of the testimony of a witness so cir-
 cumstanced as to give rise to these questions, having been considered by his counsel of
 sufficient weight to found an application to the King for a pardon—the points were re-
 ferred to the twelve judges by the Lord Chancellor: and Counsel were heard on behalf
 of the convict as matter of grace, granted upon his petition to the Lord Chief Justice,
 praying to be permitted to avail himself of that advantage.

loniously

loniously did utter and publish as true a certain false, forged and counterfeited DEED," [setting it out] with intent to defraud the Governor and Company of the Bank of *England*, well knowing, &c.

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 JOHN WAIT.

The instrument charged to have been forged purported to be a power of attorney in the common form from the prisoner and *John Cox* to *John Underhill*, a broker in *London*, empowering him to transfer all or any part of 2189*l.* 17*s.* 1*d.* being all their interest or share in the capital or joint stock of 3 per cent. annuities, erected by the 25th of *Geo. II.* and subsequent acts; and also to receive the consideration-money, and give a receipt for the same, and to do all lawful acts requisite for effecting the premises, thereby ratifying and confirming all that the said attorney should do by virtue thereof, in the usual form. The power contained the following covenant—" And in case of the death of both or either of us, this letter of attorney, as to all matters and things which after our respective decease shall be done by our said attorney, by virtue of or under colour and in pursuance thereof, shall, so far as the Governor and Company of the Bank of *England* are interested or concerned, be as binding upon our respective executors and administrators as the same would have been upon us if living, unless notice in writing of our respective deaths shall have been previously given to the said Governor and Company by our executors or administrators, or by some person or persons interested in the property to which this letter of attorney refers:

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fers : and unless such notice be given, we hereby severally covenant, promise, and engage and bind ourselves, and our respective executors and administrators, to and with the said Governor and Company of the Bank of *England*, that our respective executors and administrators shall and do allow, ratify, and confirm as good, valid, and effectual against them, and against our respective estates, whatsoever shall or may be done by our said attorney after our respective decease, so far as the said Governor and Company of the Bank of *England* shall or may be in any way or manner interested therein." The instrument bore the signature and seals of *John Wait* and *John Cox*, and was attested as follows, "signed, sealed, and delivered, in the presence of us, by the above-named *John Wait* and *John Cox*," and the names of the two attesting witnesses were subscribed to the attestation.

The second count charged a disposing of and putting away a similar forged deed.

The third and fourth counts laid the same charges, with intent to defraud *John Cox*.

The prisoner was convicted, and received sentence of death.

The facts of the case, as proved on the trial, were, that the prisoner and another person (*Edmund Naish*) had been appointed trustees under the will of *James Fitchew*. By a codicil, the testator gave to

to the trustees 2000*l.* upon trust, to pay the interest thereof to his wife, and her assigns, for her life ; and after her death, to pay the principal to his nephews *Stephen Cox* and *John Cox*. The prisoner, who alone acted as trustee under the will (*Naish* having declined the trust), shortly after the death of the testator, received the greater part of the legacy, and invested it in the funds, in the name of himself and *John Cox*, one of the persons interested in the legacy of 2000*l.* on the death of the widow who was still living.

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To possess himself of the sum so invested, was the object of the Prisoner in committing the act which was the foundation of the present indictment upon the charge of forgery in subscribing the signature "*John Cox*" to the Power of Attorney, authorising *Underhill*, the Broker, to transfer the stock. The Bank Ledger was produced to shew that the stock was still standing in the names of the Prisoner and *Cox*. The subscribing witnesses proved that the instrument had not been executed by *Cox* in their presence. *Cox* himself was then called to prove that he had not signed the deed, and the other facts already stated. His testimony was objected to as inadmissible in point of law, on the ground that he had an interest in annulling the instrument by proving the forgery ; but that objection was overruled by Mr. Justice *Bayley* and Mr. Baron *Garrow*. *Cox* was then examined. He proved that his name to the instrument was not of his writing, and he stated that as soon as he heard of the transaction, which was

1822.

The KING

JOHN WAIT.

three days afterwards, he sent the following letter addressed to the Accountant-General of the Bank of England:

SIR,

HAVING received information that the Bank is in possession of a Power of Attorney purporting to be executed by Mr. *John Wait* and myself for the sale of stock in the Three per cent. Consols, standing in our names, if such be the fact I beg distinctly to say I have not executed any such Power, nor was I privy to its execution. I should have sent to you express but I understand the Bank have refused to proceed in the business without hearing from me, and therefore the present mode will be sufficient to apprise you that I have not executed the power in question.—I am, &c.—*John Cox.*

On the part of the Convict the following Petition was afterwards addressed and presented to the King, stating the facts, and soliciting a pardon in consideration of the doubt :

“ TO THE KING’S MOST EXCELLENT MAJESTY.

“ The most humble Petition and prayer of *John Wait*, now a prisoner under sentence of death in the Gaol of *Newgate*,

“ Sheweth

“ That your Petitioner was tried at the *Old Bailey* Sessions on the seventh day of *December* instant,

instant, for forging the name of *John Cox* to a power of attorney for transferring stock, which stood in the books of the Bank of *England* in the names of your Petitioner and the said *John Cox*, and which belongs beneficially to one *Sarah Fitchew* for her life, and, after her decease, to the said *John Cox* and one *Stephen Cox*.—That, at the said trial, the only witness called to prove that the name of *John Cox*, subscribed to the said power of attorney, was not the hand-writing of the said *John Cox*, was the said *John Cox* himself.—That your Petitioner's Counsel objected to the competence of the said *John Cox* to prove the forgery of the said Power of Attorney, but that the learned Judges who presided admitted the evidence of the said *John Cox* because another witness had said that the stock standing in the names of your Petitioner and the said *John Cox* had not been transferred under the said Power of Attorney, and a notice had been sent by the said *John Cox* to the Bank of *England* that the said Power of Attorney was forged.—That your Petitioner was found guilty upon the evidence of the said *John Cox*.

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“That your Petitioner is advised by his Counsel that, for the following reasons, the said *John Cox* was not a competent witness for the prosecution on the said trial :

“*John Cox* was interested in the question whether this power of attorney was forged or genuine, and therefore he ought not to have been admitted to prove the forgery.

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“ In civil cases the rule now adopted certainly is, that, although a witness be interested in the question, if he is not interested in the event of the action, he is a competent witness (*a*), but it is equally well established, that, upon an indictment for forgery, if the witness at the time of his examination be interested in setting aside the instrument, supposing it genuine, either as against the prisoner or any other person, he is not competent to prove the forgery (*b*).

“ It may be admitted that *John Cox* had no interest in the event of this prosecution; but if, at the moment when he was called into the witness-box, he had any interest, however minute, that the Power of Attorney should not be his deed, he ought to have been rejected. In *Rhodes's Case* (*c*), where, upon an indictment for forging a Power of Attorney, whereby stock was transferred, the person whose name was forged had not the remotest interest in the event of the prosecution, but he was held to be an incompetent witness to prove the forgery, because it was his interest that the power of attorney should not be considered genuine. In *Rex v. Baston* (*d*), Lord ELLENBOROUGH, referring to the practice of not permitting a person who has an interest that an instrument should not be genuine to prove it forged, says, “ upon what principle that anomalous case was so settled, I cannot pretend to say, but, having been so

(*a*) *Bent v. Baker*, 3 Term Rep. 27.

(*b*) *East's Pleas of the Crown*, chap. XIX. s. 63.

(*c*) 2 Strange, 728.

(*d*) 4 *East's Reports*, 582.

settled,

settled, it may be too much for Judges sitting on trials to break in upon it, the anomaly can only be remedied by the legislature." And, in the recent case of the *King v. Benjamin Crocker* (a), the Twelve Judges held that, upon an indictment for forging a promissory note, the person whose name was forged as maker was not a competent witness even to prove that he had not paid interest on the note in the manner represented by the prisoner.

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"The point to be inquired into therefore is, whether when *John Cox* was called into the witness-box he had any interest [in establishing] that this Power of Attorney purporting to be executed by him should not be [considered to be] his deed.

"There may be a grave doubt whether there was sufficient evidence that at that time the power had not been acted upon. The first witness examined on the trial produced a ledger of the Bank of *England* in which the stock appeared standing in the names of *John Wait* and *John Cox*; but it did not appear to what day the ledger was made up, and a transfer of the stock, supposing the Power of Attorney to be genuine, might have taken place at the Bank in the interval between the examination of this witness and the swearing of the said *John Cox*.

"But assuming that the Power of Attorney had not been acted upon, still *John Cox*, when called

(a) 2 New Reports, 87, and *Hunter v. King*, 4 Barn. and Ald. 209.
 into

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into the witness-box, appears to have had an interest that it should be set aside as forged. If genuine, it was then an existing, valid Power of Attorney, under which the stock might have been lawfully transferred. It may not have been revocable by *John Cox*, as it was the joint power of himself and another; and it may have been coupled with an interest. But if revocable in its nature, it had not been revoked. Being under seal, it could only be revoked by an instrument under seal.

“The notice to the Bank of *England* is no revocation, for that is not under seal, and it proceeds upon the supposition of the power being a forgery. The probability or improbability of the Bank afterwards allowing the stock to be transferred under this power is of no consequence. If it be genuine, they would, in point of law, be justified in permitting a transfer under it at any time until it is revoked by deed and they have notice of its revocation. It is possible, therefore, if the power was genuine, that during the very time while *John Cox* was under examination the Bank might have been permitting a transfer of the stock; so that, before the examination was ended, and before the power could have been revoked, the transfer might have been completed. That moment he would have been guilty of a breach of trust, and would have been answerable in a court of equity to *Mrs. Fitchew* and to *Stephen Cox*. It seems to follow that during the examination of the witness he had an interest that the instrument should be a forgery.

“Supposing

“Supposing that he had an opportunity of revoking the power after his examination and before the stock was transferred, till revoked it might at any time have been acted upon. In case of an acquittal, it would have been handed back to *Underhill*, the person to whom it was given, and he no doubt would have forthwith proceeded with it to the Bank of *England*, and sold out the stock. But the witness knew that, in case of a conviction, the instrument would be impounded by the Court, and no revocation would be necessary. He had an interest that it should be a forgery, from the necessity of executing a revocation if it was genuine. The revocation could not be executed without pecuniary expense, and the magnitude of such expense is immaterial.

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 JOHN WARR.

“Besides it may deserve consideration whether the mere execution of a Power of Attorney to sell trust stock in breach of the trust would not render the trustee liable to be removed by a court of equity, and to the costs of a bill to be filed against him for that purpose.

“There seems to be no doubt, therefore, that it was for the interest of *John Cox* that the power should be a forgery ; and, if so, all the authorities concur in deciding that he was not a competent witness to prove that it was not his deed.

“That your Petitioner, with the most profound respect and reverence for the learned and upright Judges before whom he was tried, submits that, on account of the admission of the said *John Cox*

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as a witness to prove the forgery of the said power of Attorney, the conviction of your Petitioner was without proper evidence, and contrary to law, and your Petitioner therefore prays that your Majesty's free and gracious pardon may be extended to him.

" And your Petitioner will ever pray," &c.

By direction of the Chancellor (to whom the Petition was sent by command of his Majesty) the points of law which had been raised were referred to the Judges, and this day it was argued by Counsel (a) on both sides in the Exchequer Chamber.

Campbell, on behalf of the Convict, supported by argument and authorities the reasons urged in the Petition why the evidence of *Cox* should not have been received on the trial.

In addition to what is there advanced on that part of the objection—that the witness was incompetent from interest—the prisoner's Counsel cited the authorities of *Watts's Case* (b), *Bunting's Case* (c), *Rex v. Russel* (d), *Rex v. Rhodes* (e), and *William Thornton's Case* (f).

On the second point—that the notice given by

(a) Counsel were permitted to attend in consequence of an application made to the Lord Chief Justice, by petition, presented on the part of the prisoner, that he might have the assistance of Counsel.

(b) 3 Salk. 172.

(c) 2 East, Pl. Cr. 996.

(d) 1 Leach, Cr. 8.

(e) 1b. 24.

(f) 2 Leach, Cr. Ca. 634.

the

the latter to the Bank was not an efficient revocation of the power—it was urged, that the power having been sealed and delivered, and containing a covenant, was, in fact and in law, a deed : and being so, the revocation could only be by deed. That principle is recognised by Lord Coke (a) and all writers of authority on the subject. The maxim is, “ *Nihil tam conveniens est naturali æquitati quam unum quodcunque eo dissolvi ligamine quo ligatum est*” (b). The revocation of a deed can only be effected by a deed—an instrument having all the qualities, incidents, and requisite qualifications of a deed (c); a submission to arbitration by deed can only be revoked by deed. *Vynior’s Case* (d), *Milne v. Gratrix* (e), *King v. Joseph* (f), *Marsh v. Bulteel* (g).

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It was also urged (on the point of interest in the witness) that he had an interest in revoking the power by the collateral and indirect means of shewing it to be a forgery, inasmuch as a genuine power of this description by deed could not be revoked but by deed, which would be a certain expense to him, although it should only be to the amount of 1*l.* 15*s.*, the lowest price of the necessary stamp for that purpose, or even the value of the paper.

Bosanquet, Serjt., in support of the conviction,

(a) *Blake’s Case*.

(b) *Noy*.

(c) *Shep. Touchst.* 51.

(d) 8 Co. Rep. 159. (81 b. 2).

(e) 7 East, 608.

(f) 5 Taunt. 452.

(g) 5 Barn. and Ald. 507.

urged

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 v.
 JOHN WART.

urged that the exclusion of testimony in certain cases on the ground of interest in support of prosecutions for forgery being admitted to be an anomaly, and an exception to the rule, it ought not to be extended ; that such an interest ought to be a certain, and direct, and not contingent, or possible, and indirect interest.

He contended, however, that *Cox* had no interest to sustain by proving the instrument false ; for the instrument, if genuine, neither conferred any interest on *Underhill*, nor took any interest out of *Cox*. *Underhill* was merely constituted *Cox*'s agent, thereby to receive money for him, for which *Underhill* would be accountable to *Cox* for what he should receive under the power given by it, if it were a legal authority ; and it was not to be taken into consideration upon a question of this sort, that *Underhill* might perhaps not duly account to *Cox*. The Bank take no notice of trusts ; they know no persons but the legal owners of stock ; and whether the parties would be answerable to each other in a Court of Equity in certain events, would be wholly beside this question : and the interest in *Cox*, which would exclude his testimony, ought to be such as could be shewn on the trial, when the objection was taken.

He contended, also, that the power of attorney never gave any legal authority to the broker, because it was not executed as is required by the Bank Act (52 Geo. 3. c. 24.), so that *Cox* could not be in any manner affected by it.

On

On the second point—which, it was observed, raised the most important, as it was the more plausible objection—it was insisted, in answer to it, that the power supposing it to have been genuine, had been, in fact, revoked by what Cor had done upon being informed of it, and by the letter addressed to the Bank. It was revocable by Cor at any time, and at his will, and by any means; and if so, there could be no possible interest in Cor to shew it to be a forgery: and it was not to be considered, in arguing this question, that he had an excluding interest in the value of the stamp or the paper, and, in fact, he might have destroyed it by an oral declaration, or any act indicating an intention to recal the power. If a lease were executed, giving only an estate at will, the lessor might revoke it without deed, by act *in pais*, or by parol determining the will (a). Before the Statute of Frauds, wills might be revoked by parol (b), and an appointment of a testamentary guardian, which must be in the presence of witnesses, under the same statute may be revoked, without the intervention of witnesses. *Ex-parte* Earl of Ilchester (c). Submissions to arbitration (it was submitted) were distinguishable, because they were always *inter partes*; and referring to *Fitzherbert's Abridgment* (d), it was observed, that there must be some mistake in the passage, because it was not borne out by the reference. In *Vynior's Case*, the revocation being by deed, was

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The KING
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(a) Co. Litt. 55. (b)

(b) 1 Roll. Abr. 614.

(c) 7 Ves. 377.

(d) Tit. Arbitrement, 22.

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v.
JOHN WAIT.

not relied on by Lord *Coke*, who uses the word countermand, as if any writing would have been sufficient. In further support of the proposition, that powers of attorney are revocable by matter *in pari*, the Court were referred to *Roll's Abr. (a)*.

It was urged in conclusion, that in practice generally, as well as by the uniform usage of the Bank, powers were always, without exception, revoked by mere notice; and they must be taken to be executed on all occasions with reference to the existing practice, which obtains as to their revocation—and a revocation of a power would destroy covenants in it, as they must necessarily be dependent upon the existence of the power,—and that were any more formal revocation necessary, a man might be robbed of his stock before he could prepare the required instrument of revocation.

Rhodes's Case was distinguished, in that the witness there was interested, because his stock had been actually transferred; and if that had been the case here, the Bank would, as they have always done in such cases since that time, have restored the competency of the witness, by replacing his stock. But the Bank could not restore the competency of the witness by such means, if the argument used to-day for the prisoner be sound, or a witness, who could not be examined if the attempt to defraud failed, might be examined if it succeeded.

(a) Vol. 2. p. 8. pl. 3. tit. Ecoeffment, and p. 12. pl. 6 and 7.

Campbell,

Campbell, in reply, distinguished the cases in *Rolle*, in that there was no power given by deed in any of those.

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* * The convict was ultimately ordered for execution.

1823.

Friday,
31st January.

EDWARDS v. HARRISON.

ADAMS shewed cause against this Rule, which had been obtained last term by *D. F. Jones*.

A Defendant, on being served with process, and before declaration filed, took out a summons, calling on the Plaintiff to shew cause why on payment of a sum certain and the costs, proceedings should not be stayed. The Plaintiff's agent, after taking time to consult his clients in the country, stated

It required the Plaintiff to shew cause " why so much of a former Rule of the 18th of June, which directed, that in ' case the Plaintiff should accept the sum of 27*l.* 10*s.* with costs, to be taxed in full discharge of the suit between the parties, then the Plaintiff should proceed to tax such costs, and the Defendant should pay such costs,' might be discharged: and why the Master should not be directed to tax the Plaintiff's costs

to the agent for the Defendant that they intended to proceed for a larger sum, after deducting a sum from the original amount allowed to Defendant to be set off, and consequently the summons could not be proceeded in, because the Judge could make no order in such a Case.

The Defendant's agent tendered the same sum, and costs, which were refused. A declaration was filed, and the general issue pleaded, and the Defendant paid the money tendered into Court, and obtained the usual rule for that purpose. The Plaintiff afterwards took the money so paid in out of Court, and served an order for taxation of costs.

Under these circumstances the Defendant obtained a rule to shew cause why the master should not tax him his costs subsequent to the issuing the summons, and why they should not be set off against the costs to be allowed to the Plaintiff, before the summons. But the Court ultimately discharged the rule, *with costs*, on the ground that it was not under the circumstances founded on the practice of *this Court*—that the Plaintiff had shewn enough to raise a strong presumption that more was really due, whilst the Defendant had not sworn that more was not due—that the balance being small was sufficient reason (if any were required) for not going on to trial—that the rule was inconsistent with the original rule—and that the Defendant's case did not justify the application.

In a proper case, however, the Court considered that they might interfere, in the manner now required of them, on a special application.

only,

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only, up to the time of taking out the summons for stay of proceedings, upon payment of 27*l.* 10*s.*

“ And why the Master should not also tax the Defendant’s costs subsequent to such summons, occasioned by the Plaintiff not taking the said sum of 27*l.* 10*s.* and costs, up to that time, together with the costs of this application.

“ And why the Defendant should not set off the costs to be allowed him against the said costs to be allowed to the Plaintiff; and in case the defendant’s costs exceed the Plaintiff’s costs, why the Plaintiff should not pay the difference to the Defendant, or his clerk, in Court; and that proceedings be in the mean time stayed.”

The Defendant’s agent stated in his affidavit made in support of the motion for this Rule, that the Defendant had been served on the 21st of *April*, with process issued on the 27th of *March*; that the Defendant had made a tender on the 28th of *March*, but the writ having been then sued out, his agent issued a summons, calling on the Plaintiff to shew cause why, upon payment of 27*l.* 10*s.* for the debt, and on payment of the costs to be taxed, all further proceedings should not be stayed; that the Plaintiff’s agent, having taken time and communicated with his client in the country, informed the Defendant’s agent, that the demand was 37*l.* and upwards, and that less would not be taken. The Defendant’s agent, before declaration filed, tendered the 27*l.* 10*s.* and costs, which

which was refused, the Plaintiff still insisting on the larger sum. An appearance was afterwards entered for the Defendant (9th of *May*), at the request of the Plaintiff's Clerk in Court, and a declaration was then filed, the general issue pleaded, and 27l. 10s. paid into Court by the Defendant, under the usual Rule. The Plaintiff's agent then accepted that sum, and served an appointment to tax the costs. The deponent then obtained a summons, calling on the Plaintiff's Attorney to shew cause why the Master should not be restrained from taxing the Plaintiff's costs subsequent to the taking out of the original summons, to stay further proceedings on payment of the same sum and costs, &c. &c. [in the terms of the present Rule] and upon that summons an order was made by Mr. Baron Wood (who refused to make it in the terms of the summons), staying the taxation until the fourth day of the ensuing (*Michaelmas*) Term, to give the Defendant an opportunity of applying to the Court.

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 EDWARDS
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The Rule was obtained accordingly, on the ground that the Plaintiff ought to have taken the money in the first instance, and that it was vexatious and oppressive to proceed after that offer, thereby putting the Defendant unnecessarily to trouble and expense, without any object which could have been of advantage to the Plaintiff. On moving for the Rule, the case of *James v. Raggett* (a) was relied on as an authority directly in point. The cases of *Zeevin v. Cowell* (b), and *Ro-*

(a) 2 Barnew. and Ald. 654. (b) 2 Taunt. 203.

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berts v. Lambert (a), were also cited. The Rule was afterwards enlarged to the present term, without costs on either side.

The affidavits of the attorney in the country, and his agents in London, stated, that the action was brought for the purpose of recovering back the sum of 67*l.* 10*s.* paid by the Plaintiff to the Defendant, in part of the fee agreed to be given on the apprenticeship of the Defendant's son to the Plaintiff, who was a surgeon, the Defendant having turned the youth away at the end of ten months, and before he was actually bound. Against that demand, the Defendant insisted on a claim for board and lodging during that period, at the rate of 40*l.* a-year, which the Plaintiff agreed to allow.

It was further sworn, that it was intended to proceed in the action, as the Plaintiff was entitled to recover a larger sum than had been offered, and that it was expected that a larger sum would have been paid into Court on pleading; but that, in consideration of the probability of the Plaintiff having ultimately to pay more than the amount of the difference as extra costs, if he should carry the cause to trial, it was judged more advisable to take out the sum paid into Court, than incur any further expense.

Upon that statement it was contended, that the Plaintiff had a right to refuse the offer made, and

(a) 2 Taunt. 283.

put

put the Defendant to the ordinary course of paying money into Court on pleading to the action ; and that, as the Plaintiff claimed *bond fide* a larger sum, there was good reason to believe that the Defendant would do so, and that was sufficient to justify the Plaintiff in waiting the result, and proceeding in the mean time ; that the Plaintiff was not bound, according to the practice, by the offer which had been made after action brought: It was remarked, that in the affidavits filed in support of the application, it was nowhere denied that more than the sum which had been offered was due. That circumstance, it was submitted, would negative vexation or oppression on the part of the Plaintiff, on whose behalf it had been shown, that a larger sum was due to him, if any part of his demand were just.

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The case of *Sawbridge v. Corwell* (a) was cited for the sake of the principle on which the Plaintiff rested his opposition to this rule, although there the Court determined, that in a case of clear vexation and trick, they would not allow the Plaintiff costs of the declaration, where the Defendant had done all in his power to make a tender of the debt and costs. The Court said there; " It is not, however, to be taken as a general rule, that because a man does, *pacis causâ*, or from having no hope of getting paid if he recover more, ultimately accept a smaller sum than he at one time claimed, he was therefore to pay the costs."

(a) 4 Taunt. 255.

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In the cases cited from the 2d *Taunton*, the whole sum had been offered to be paid, with all the costs; and in *Burmester v. Hilch* (a), the Court refused a Rule to show cause why the Defendant should not be at liberty to pay into Court the full demand and costs up to the time when the Defendant had offered to pay the sum demanded and costs, the application being made upon the ground of that offer.

Jones, in support of the Rule, urged that the cases had, in modern times, established a practice which would warrant this application; for it had been frequently determined on the fair and equitable principle, that where a Plaintiff takes out of Court a sum of money less than his demand paid in by the Defendant, on pleading that precise sum, together with costs, having been tendered and refused before declaration filed, and the Plaintiff does not show that any circumstance has occurred since the offer made to render it adviseable to accept that sum after plea, which did not exist before the filing of the declaration, the Courts would only allow the Plaintiff the costs of proceeding up to the time when the offer was made. That was the principle on which the Court proceeded in the case of *James v. Raggett* (b), which was precisely similar in circumstances to the present. There the Court said, " This is a most reasonable

(a) 13 East, 551.

(b) 2 Barnew. and Ald. 776.*

* In that case there were two separate demands made by the Declaration, and the Defendant paid the whole of one into Court, and the Plaintiff abandoned the other, having no evidence to support it, and made the offer alluded to in the Judgment.

application.

application. The Plaintiff's offer to stay proceedings upon the Defendant's paying the costs, now comes too late, costs having been incurred subsequently to the 8th of *May*. It is consistent with justice that the Defendant should be at liberty to set off the costs he has incurred since the refusal of his offer, against those of the Plaintiff, up to the 8th of *May*, when the summons was taken out."

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If, by the practice, the Defendant were allowed to pay into Court the sum admitted to be due, as soon as he should be served with process, and the costs, (it was urged) it would necessarily follow, that if the Plaintiff proceeded afterwards, it must be at his peril; and if he stopped just short of trial only, he would be obliged to pay all the costs incurred since the payment of the money into Court; and this, in effect was the same thing.

In a recent case (*a*), it was said, Mr. Justice *Holroyd*—when the Defendant, in an action to recover 38*l.* before the declaration was filed, took out a summons to stay proceedings, on payment of 25*l.* and costs, which was not proceeded in because the Plaintiff claimed more—on a subsequent summons, issued after the 25*l.* had been paid into Court, and a plea pleaded, said, he should make the order as prayed, which was in terms the same as this Rule, unless the Plaintiff showed, by affidavit, some such reason for changing his mind, as that a material witness was dead, which rendered

(*a*) 2 Barnew. and Ald. 776.

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it unsafe to go to trial; or other fair ground had occurred since the former summons, for accepting what had then been refused. The matter stood over for that purpose, and no such affidavit having been filed, the order was made, and the Plaintiff had to pay the Defendant a sum for his, the Defendant's, costs, exceeding his own costs by that amount. Referring, also, to *Tidd's Practice* (a), and the cases there cited, it was submitted, that if the Plaintiff had required time for deliberation, he should have stayed proceedings until he had made his election, and should not have gone on wantonly at the Defendant's expence, unless he meant to have proceeded to trial; in which case, if he had not recovered more than had been paid into Court, the Defendant would have been entitled to costs: and if there were any dispute about the amount, the Defendant had a right to have the question tried as well as the Plaintiff, in order to settle the matter of costs. As he had not chosen to do so, it was insisted that this Rule ought to be made absolute.

RICHARDS, *Lord Chief Baron*. No case has been cited wherein this Court has granted a similar application under the circumstances of this case. There is therefore no ground for urging that it is agreeable to the practice of this Court, whatever it may be in others, to do that which is required in this instance: and however convenient it might be that a new practice should be established in any respect, that must be always matter of considera-

(a) 7th Edition, pp. 644, 645.

tion independent of any question in particular cases which incidentally come before the Court. We cannot grant or refuse a motion on the ground of its being abstractedly reasonable or useful that any particular course should be adopted, if the existing practice do not warrant it. It would be no objection therefore to our discharging this Rule, to say, that it is inconsistent with the particular practice in any other Court. I do not however consider that in this case there would be any diversity of practice in doing so, under the circumstances now submitted to our consideration, according to the principle of the cases which have been cited. The original Order (a) was obtained by the Defendant on motion, after the filing of the Declaration, and it directed, that in case the Plaintiff should accept the sum paid in, with costs to be taxed, he should proceed to the taxation, and the Defendant should pay such costs, and thereupon all further proceedings were to be staid. The proposal now made is, that the Plaintiff having accepted the money paid in, shall himself pay all the costs, although at the time when that order was made, the Defendant engaged to pay the costs then incurred. So that the Defendant after having obtained such an order according to the practice of the Court, would use it to take the Plaintiff in, by coming with another motion applying to discharge his own order, as far as regards the payment of costs by himself, and that on the ground

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 Richards, C.B.

(a) The Rule for bringing the money into court, and in *this court* the order for payment of the costs, is peremptory. Vide *Plummer v. Savage*, ante. vol. vi. 126.

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of the Plaintiff having accepted the money, on the payment of which into Court that order was founded, and on the acceptance of which the Defendant undertook to pay the costs also into the bargain, making an attempt to throw on the Plaintiff the burthen of the costs, contrary to the practice of this Court, because it is said that by the practice of some other Court it may be done. There is no time limited by the practice within which money put into Court must be taken out.

It must not be omitted to be observed, that in this case the Defendant does not swear that no more was due to the Plaintiff than the sum paid into Court. The Plaintiff, on the other hand, shews that more was due, and it is sworn that until that determination was changed, the cause was intended to be proceeded in. The Plaintiff however at last elects to take out the money which had been paid in, and he gives a sufficient reason for so doing, in my opinion. It was the most prudent course, considering the amount of the difference. Now I consider that in order to succeed in an application of this sort, it ought to be shewn to the satisfaction of the Court, that the money which had been paid in, was all that was really due, or that there was good reason for thinking so. Unless that were done, I should hold that such an application ought not to succeed. More especially should I, where, as in this case, it is shewn not to be all that was due. There may be up to the last moment very good reasons for not going to trial. That which has been stated in this instance

is an obvious one, the difference in the amount of the remainder of the claim and the extra costs; for certainly it would be better to lose the small balance, than proceed to recover it at three times the amount.

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These circumstances I think sufficiently distinguish this case from those which have been cited, even if it were desirable that the practice said to prevail in other courts should be adopted here.

It was said that some circumstance should have been stated to shew that since the summons was taken out, there was good reason for taking out the money paid into court, which was wanting before. I do not see that there is any foundation for that distinction, or that any actual occurrence should have taken place. It is sufficient if the Plaintiff is disposed to alter his mind, and he may have prudential reasons which may determine him, which he had not before, such as his apprehensions of an approaching bankruptcy or insolvency, and many others. I am therefore of opinion that this Rule should be discharged.

GRAHAM, *Baron*. I am of the same opinion; nor do I think that the grounds of our determination in any respect conflict with the decisions which have taken place in other Courts. The circumstances of this case clearly distinguish it from those to which we have been referred. If there were any real ground for a special application to the Court, having for its object to punish the obstinacy,

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Griffin, B.

stinacy, or improper and vexatious conduct of a party who should oppressively refuse a reasonable offer, by not allowing him more than a certain quantum, the Court on a proper occasion would perhaps grant an application so shaped as to suit such a measure. There is in this case abundantly enough in the facts to form an answer to this application. The affidavit of the Plaintiff's agent shows that more than the sum paid was considered due throughout, and that is not contradicted in any way, or attempted to be made doubtful. Then the expense of going to trial is in this case an ample reason for doing what the Plaintiff has done, and he has acted throughout under the advice of his Attorney. Under the circumstances of this case therefore, I am of opinion that this application respecting the costs is quite unreasonable. Whatever we might be disposed to do under other circumstances, I must say I think the Rule ought to be discharged with costs.

GARROW, *Baron*. The only fear which I have had was, lest we should be acting contrary to former decisions, in discharging this Rule. I think however that we may do so without infringing the principles of any of the cases which have been cited. The object of abridging the expenses of legal proceedings, has been of late years a matter much considered, and it has to a great extent been successfully effected, by the introduction of consolidation rules, rules for payment of money into Court, the rules in ejectment, and many others, all of which have tended very greatly to ease the expense

expense and difficulties to suitors of proceeding at Law. It might perhaps be convenient to increase their number, by adding to them a Rule that Defendants should be at liberty to pay, with costs, in the earliest stage, what they should admit to be due to the Plaintiff, though perhaps that in the present state of the practice requires the interference of the Legislature.

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Garrow, B.

In a proper case however, I think the Court might, on a special application, reach the justice of the matter, where there should be occasion for our interference, and place the Plaintiff in a situation to proceed, at the peril, not only of not receiving, but of paying costs.

The present Case certainly is not one which calls on us to make this Rule absolute. The merits are, from all that appears, with the Plaintiff. The reason which he gives for not going to trial is satisfactory. As to the criterion which we are told ought to determine this, namely, whether a different state of things has since arisen so as to have made it expedient to take the money out of Court, I do not think that that is what we ought to require to be shewn. The Plaintiff may have heard it whispered that a bankruptcy was in contemplation, that symptoms of insolvency had become visible, and many other reasons, which, although sufficient to determine a prudent Plaintiff to act as this Plaintiff had done, might not be enough to satisfy a Court that there was any actual necessity for so doing, if that were to be required. Then
it

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it has been well observed by my Lord Chief Baron that the Defendant now requires us to cancel all that he himself had asked of the Court before.

Garraw, B.

This determination proceeding on the circumstances of this case, I do not consider it as embarrassing any opinion which I may hereafter give on any other case which may be brought before the Court on a special application, under other circumstances. We may then perhaps determine according to what is said to be the result of the cases which have been cited.

Rule discharged.

With costs.

In the Exchequer Chamber.

[IN ERROR FROM THE COURT OF EXCHEQUER.]

Coram ABBOTT, Lord Chief Justice, and DALLAS,
Chief Justice C. P.

THE ATTORNEY-GENERAL v. BACCHUS, PRISCILLA,
his Wife, and MASHITER.

1823.

7th February.

THIS information (in debt) was filed against the Defendants for the recovery of the legacy duty, at the rate of 10*l. per cent.*, charged to be payable to the Crown by the Defendants, as Executors and residuary Legatees of the personal estate of *John Ogden*, on account of the residue of the personal estate of the Testator bequeathed to, and retained by them under his Will, for the benefit of the Defendant *Bacchus*, a stranger in blood to the Testator.

The facts were stated in a special verdict for the purpose of obtaining the opinion of the Court on the question of law (a).

The case was twice argued in the Court below:

the husband, a stranger in blood to the deceased; nor to be chargeable wholly with the lowest duty of 1*l. per cent.*, as being a legacy given to, or devolved to or for the benefit of a child of the deceased (in the person of the daughter), but to be chargeable by moieties as being a bequest for the benefit of each to the amount of one half; and therefore, as to one moiety, chargeable to the highest, and as to the other to the lowest duty.

Construction of Statutes.
Bequest of all the rest, residue, &c. of the personal estate of a testator to his son-in-law, G. B. and to his (the testator's) daughter P., his wife, their executors, administrators and assigns, for their absolute benefit: Held not to be chargeable under the 55th of Geo. III. ch. 184. sched. 3. with the highest duty of 10*l. per cent.* on the whole amount, as being a legacy given to, or devolving to or for the benefit of G. B.

(a) Vide *ante*, Vol. IX. p. 30.

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first in *Easter* Term, 1819, by *Shepherd* for the Crown, and *Denman* for the Defendants, when the Court of *Exchequer* gave Judgment as has been already reported in a former Volume (a).

1820.

24th November.

On the second occasion in *Michaelmas* Term, the argument was supported by

The *Attorney-General* for the Crown ; and by

Denman for the Defendants : when the Court gave Judgment for the Crown, adjudging as they had done before, that as to one moiety of the residue of the personal estate and effects of the Testator, a duty of 1l. *per cent.* was payable to the Crown, and as to the other moiety a duty of 10l. *per cent.*

Upon that judgment a writ of Error was brought by the *Attorney-General*, and the case was argued more elaborately before the Lord Chief Justice of the *King's Bench* and the Lord Chief Justice of the *Common Pleas*, on *Wednesday* the 30th of *January*, in *Hilary* Term, 1822, by

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Hilary Term,
30th *January*.

The *Attorney-General* who supported the assignment of errors, and

Denman, *contra*, for the Judgment of the Court of *Exchequer*.

For the Crown it was contended that the Judg-

ment of the Court of *Exchequer* could not be sustained in point of law. It was insisted that the legacy duty, at the rate of 10*l. per cent.* was payable on the *whole sum* retained by the Defendants under the residuary bequest, as being retained for the benefit of the Defendant *Bacchus*, the husband of the testator's daughter, who was a stranger in blood to the Testator.

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The *Attorney-General* stated, from his instructions, before he proceeded to argue the question, that it was considered to be one of very great importance, and that it had always been the practice of the stamp department of the revenue, acting under the advice of very eminent lawyers, to require and take 10*l. per cent.* upon the whole of such residuary bequests in similar cases, and that the consequence of the present determination of the Court below, if correct, and it should be affirmed, would be to give to parties who had been heretofore so dealt with a right to demand that so much should be refunded to them as the difference, upon all such occasions, between the sum paid and the sum payable would amount to. He then submitted that the question would depend on the construction to be put on the various Acts of Parliament by which duties on legacies had been imposed, and as applied to those statutes on the question of law, whether the present bequest was a legacy for the benefit of the husband or of the wife, in other words, whether it was for the benefit of a daughter or of a stranger in blood?

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The attention of the Court was first directed to the statutes in support of the argument for the Crown, beginning with the earliest, the 20th of *Geo. 3.* ch. 28, which imposed an *ad valorem* stamp duty on the receipt of the legacy. Then by the 22d of *Geo. 3.* ch. 58. the duties generally were augmented in amount, but legacies payable to wife, children and grand-children were thereby exempted from the augmentation duties: and so they were afterwards by the 29th of *Geo. 3.* ch. 51. By the 36th of *Geo. 3.* ch. 52. (upon which statute it was agreed this question would turn) new duties were imposed and made payable, not through the medium of a receipt stamp, but by charging a certain duty on the legacy itself. By the 2d section of that statute it is enacted, “ That upon every legacy specific or
“ pecuniary, or of any other description, of the
“ amount or value of 20*l.* or more, given by any Will
“ or Testamentary instrument of any person who
“ shall die after the passing of this Act, out of the
“ personal estate of the person so dying, and also
“ upon the clear residue and upon every part of the
“ clear residue of the personal estate of every per-
“ son who shall so die, whether testate or intestate,
“ and leave personal estate of the clear value of 100*l.*
“ or upwards, which shall remain after deducting
“ debts funeral expences and other charges, and
“ specific and pecuniary legacies, (if any,) whe-
“ ther the title to such residue or to any part there-
“ of shall accrue by virtue of any testamentary
“ disposition or upon intestacy, there shall be
“ raised, levied, collected and paid unto and for
“ the use of his Majesty, his heirs and successors,
“ the

“ the several duties, after the rates, and in
 “ manner following, that is to say, where any such
 “ legacy or any residue or part of residue of any
 “ such personal estate shall be given, or shall pass
 “ to or for the benefit of a brother or sister of
 “ the deceased, or any descendant of a brother or
 “ sister of the deceased, there shall be charged a
 “ duty of 2*l.* for every 100*l.*: and if the legacy
 “ is given to a stranger in blood there is imposed
 “ in the same words, a duty of 6*l.* *per cent.*”

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The 16th section enacts, “ That where any le-
 “ gacy or residue or part, &c. shall be so given
 “ to or for the benefit of any person or persons in
 “ joint-tenancy, some or one of whom shall be
 “ chargeable with any duty thereby imposed, and
 “ some or one of whom shall not be so chargeable,
 “ the person or persons chargeable with duty shall
 “ pay such duty in *proportion to the interest of such*
 “ *person or persons respectively in such bequests,*
 “ and if any person or persons chargeable with
 “ duty and entitled in joint-tenancy as aforesaid,
 “ shall become entitled by survivorship or by se-
 “ verance of the joint-tenancy, to any larger inte-
 “ rest in the property bequeathed than that in
 “ respect of which such duty shall have been paid,
 “ then and in such case all and every such person
 “ or persons so becoming entitled by survivorship
 “ or by severance shall be charged with the same
 “ duty as if the property to which such joint-tenant
 “ or joint-tenants shall so become entitled had been
 “ originally given to or for the benefit of such per-
 “ son or persons only.”

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The 17th section enacts, "That where any
" legacy or any residue or part of residue shall
" *given subject to any contingency* which may
" *bequeath* such gift, and whereupon the same may
" *bequeath* to some other persons or person, *such bequest*
" (unless chargeable as an annuity under the
" provisions in the Act contained) *shall be charged*
" *with duty as an absolute bequest* to the persons
" persons who shall take the same, subject to
" contingency, and such duty shall be paid out of
" the capital of such legacy or residue or part of
" residue, notwithstanding the same may, in case of
" such contingency, go to some person not chargeable
" with the same duty or with any duty: and if
" if such contingency shall afterwards happen, the
" the property so bequeathed shall thereupon be
" in such manner that the same, if taken immediately
" after the death of the testator or testatrix, would
" under the same title, would have been charged with
" with a higher rate of duty than the duty so paid
" the person or persons becoming entitled thereto
" shall be charged with and shall pay the difference
" once between the duty so paid and such higher
" rate of duty."


The next Act—the 44 Geo. 3. cap. 98.—more
imposes additional duties.

That was followed by 45 Geo. 3. c. 28, which
imposes additional duties on legacies to children.
By 48 Geo. 3. c. 49, still further duties are imposed.


By 55 Geo. 3. ch. 184, sched. part 3, a certain

rate of duty is imposed upon legacies given by persons who died before the 5th of *April*, 1805. Where the testator shall have died after that time, as was the case in this instance, there is made payable "for every legacy specific or pecuniary, of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person who died after the 5th of *April*, 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage, or other disposition of his or her real or heritable estate or any part thereof, and which shall be paid, delivered, retained, satisfied or discharged after the 31st of *August*, 1815, and also for the clear residue, *where any such legacy or residue or any share of such residue shall have been given or have devolved to or for the benefit of the children of the deceased, or any descendants of a child of the deceased 1*l.* per cent.*" Then 3*l.* per cent. is made chargeable upon legacies to brothers and sisters and other collateral relations. *And where any such legacy or residue or any share of such residue shall have been given or have devolved to or for the benefit of any person in other degree of collateral consanguinity to the deceased than is above described, or to or for the benefit of any stranger in blood to the deceased, a duty is imposed at and after the rate of 10*l.* per cent. on the amount or value thereof.* And it enacts (by section 8) "that all the powers, provisions, clauses, and penalties contained in and imposed by the several Acts of Parliament

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Parliament relating to the duties hereby repealed, and the several Acts of Parliament relating to any prior duties of the same kind or description, shall be of full force and effect with respect to the duties thereby granted; and to the vellum, parchment and paper instruments, matters and things charged or chargeable therewith, so far as the same are or shall be applicable in all cases not hereby expressly provided for, and shall be observed, applied, enforced and put in execution for the raising, levying, collecting and securing the duties," &c.

After the consideration of the terms of the several Statutes, he submitted the first questions that would arise would be, what interest passed under this bequest to the husband, and what to the wife? or whether any such interest passed to the wife under this residuary bequest in the will to both, as would defeat the right of the husband and enable her to claim any part of the residue apart from and independently of him within the true meaning of these provisions of the legislature? It was anticipated that it would be contended on the other side, as it had been before in the argument in the Court below, that this bequest was altogether meant to be, and was in effect purely and wholly for the benefit of the wife, being as to the husband, merely a chose in action; —that the husband takes nothing under the will as a mere legatee, but only acquires a right by operation of law to the fund so given to himself and his wife, deriving his title from his character of husband to property which he may nevertheless suffer

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suffer to become the sole property of his wife if she should survive him, by his not having reduced his right into possession during his life. To this it was answered, that even so considering it, these statutes were so worded as to apply to such an interest and to affect the husband's right under such circumstances, independently of that possible and remote interest which the wife might perhaps at some time, under a very particular state of things, acquire in the same fund. He contended that the legal effect and operation of such a bequest being to give to the husband an immediate available interest in the whole, it must be considered to be, in the words of the Act, a legacy or residue given or devolving to or for the benefit of a stranger in blood, the husband being in no degree of kindred or consanguinity with the deceased, and consequently chargeable with the legacy duty after the highest rate of 10*l.* per cent.

It was urged that as affecting real property even, there is a great and marked distinction in respect of the property of which a woman becomes seised before her marriage, and that to which she acquires title after her marriage, under grant or other conveyance executed to her husband and her. In the latter case they both take the whole in succession by entireties and not by moieties or as joint-tenants. During their joint-lives the whole and entire interest in the estate is in the husband. In the comment by *Lord Coke* upon the section 291, in *Littleton* lib. 3, cap. 3, p. 187 b. it is said, "If a joint-estate be made of land by a husband

husband and wife and to a third person, in this case the husband and wife have in law in their right but the moiety, and the third person shall have as much as the husband and wife, viz. the other moiety, &c. and the cause is for that the husband and wife are but one person in law, and are in like case as if an estate be made to two joint-tenants where the one hath by force of the jointure the one moiety in law, and the other the other moiety, &c. In the same manner it is where an estate is made to the husband and wife and to two other men : in this case the husband and wife have but the third part, and the other two men the other two parts, &c." The reason afterwards given [187. b.] is, " because they are only one person in law " and therefore it is added " It hath been said that if a reversion be granted to a man and a woman and their heirs, and before attornment they intermarry, and then attornment is made, that the husband and wife shall have no moieties in this case."

That being the law with respect to a fee-simple estate, the whole being in the husband, one question will be what is the legal effect of a gift by will of a personalty to a husband and wife after marriage, with respect to the interest taken under it by the husband ? It was admitted that there was no case to be found in the books on that point, precisely similar to the present. In 1st *Rolle's Abridgment*, Title *Baron and Féme*, page 343, placitum 1, *et seq.* it is stated, that if *baron* and *fême* be joint tenants for years of land, the *Baron* may dispose of

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of all. So far has that doctrine been carried, that it was decided in the case of *Ankerstein v. Clarke* (a), that where a bond was given to a husband and wife describing her to be the administratrix of a third person, the husband who brought an action upon that bond might declare upon it as a bond to himself alone. The Defendant had pleaded *non est factum*, and upon the trial it was contended, upon the production of the bond, that the bond was not the bond described in the declaration—a bond to the husband alone, but that it being a bond to him and his wife as administratrix, the wife ought to have been joined in the action, and that the husband could not declare upon it as a bond given to the husband alone. The Plaintiff was nonsuited on that point, and on a motion to set it aside, the Court held that the action was well brought. In the case of *Beaver v. Lane* (b), cited in that case, it was determined, that where a covenant is made by a husband and wife, the husband may declare upon that covenant alone.

These cases (it was urged) shew that with respect to personalty given by deed or secured by bond to husband and wife, the husband may treat it as a security or as property given to himself alone, and may alone recover the subject-matter at law. That doctrine will be found to be carried still further with respect to leases for years. It has been held, that where a lease for years was

(a) 4 T. R. 616.

(b) 2 Mod. 217.

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made to the baron and feme as in this case, the whole interest is in the baron during coverture, so as that it would be extinguished by *his* acceptance of a feoffment. That is established by the case of *Downing v. Seymour* (a). A distinction is made in the case by the Court between a lease and a conveyance, by bargain and sale enrolled or by fine, and it seems to have been the opinion of the Court, or at least of the Reporter, that it might have been otherwise in the latter case. But in *Bacon's Abridgement* (b), where this case is mentioned, that proposition is queried by the writer of that article (considered to be *Lord Chief Baron Gilbert*), "because the lease being made after marriage, when there are no moieties between husband and wife, the husband cannot be said to be possessed thereof in her right more than in his own, but both are possessed by entireties; therefore it should seem in that case likewise that the term would be merged."

It was further submitted that it would be sufficient in this case to establish, that by operation of law the husband was entitled to, and might legally possess himself, under this bequest, of the whole of the property thereby bequeathed to him and his wife, and if so it would not be necessary to enquire what would be the effect of a case, in which the husband, under such a bequest as this, should not actually reduce the property into possession during the coverture; at least, what would be the effect of that, with respect to the right of

(a) Cro. Eliz. 912.

(b) Tit. Baron and Feme, Vol. I. p. 288.
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the wife if she survived, although the Court below appeared to have entertained an opinion that that consideration was necessary to the determination of this question. If, however, it should be established, that upon the death of the Testator, the husband, in point of law, became possessed or entitled to be possessed of the whole, the public cannot be deprived of the duty which is made to attach upon the beneficial interest given to him by this bequest, on the hypothesis that it might not become his property, by the laches or by the negligence of the husband, or even by his deliberate intention to elect not to reduce it into possession, for the purpose of giving to the wife the whole and sole benefit of it, if she survived. It was, at the same time, insisted that that question could not be raised upon this record, where it was found that there had been a retainer of this property, by and on behalf of these parties, Defendant, one of whom was the husband himself, and he must be considered, consequently, as having, in fact, retained it for his own benefit, being himself one of the executors of the Testator.

It was then put in argument, that supposing this were a case of a bequest to a son of the Testator and his wife (or a gift to the wife of a son), it would then have been successfully contended that a duty of 1*l. per cent.* alone, would attach upon this property, for it would be said he is the person who takes the interest under this bequest, and is the person who is, in the first instance, entitled to call for the legacy, and, therefore, he being the
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son of the Testator, the duty of 1*l. per cent.* only would be payable by him : and of that proposition the present argument was the converse, and was therefore equally true.

It was contended broadly, that if this residuary bequest had been to the wife alone, as it would be by consequence and operation of law, a gift to and for the benefit of the husband, inasmuch as he may demand payment of the legacy, and as he would be competent alone to release it, or to sue for it alone in the Ecclesiastical Court, it must, therefore, even in that case, according to the words of this statute, be considered and treated as a legacy given in effect to him, and that would be sufficient to entitle the Crown to the higher duty imposed by the statute, as being a legacy of the residue given to, or devolved to or for his benefit.

[ABBOTT, *Lord Chief Justice*.—There is one case (a) which establishes, that if the husband die before payment, or even before he would be entitled to receive it, his administrator shall be entitled to the legacy.]


In that case, it was held that the administrator of the husband might release a legacy left to the wife, though the time at which it was payable had not expired, for he has an interest in it before the time of payment accrues. That was the case of a legacy of 10*l.* given to a

(a) Anon. 2 Rolle's Rep. 134.

married

married woman, payable in eighteen months after the death of the Testator, her husband died within the eighteen months. The question arose between the son of the wife and the husband, and it was decided in favour of the husband.

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To the argument used on the former occasion—that Courts of Equity will frequently, under circumstances, interfere to prevent the husband receiving a legacy given to her, unless he makes a settlement upon the wife, from which it was deduced that, therefore, clearly in equity, it is considered that the wife has an interest in the sum so bequeathed—it was answered, that, admitting that to be so, it was because Courts of Equity act, in such cases, with a particular view regarding such legacies *diverso intuitu*. They proceed upon this principle, that if the husband is obliged to come into a Court of Equity to enforce payment of a legacy, not having first made a proper and proportionate settlement upon his wife, the Court will not aid him by administering what he considers equity, unless he first does what the Court considers equitable. That is the only principle on which a Court of Equity can ever interfere, and that can only happen where the husband is driven into such a Court, in extraordinary cases, to obtain satisfaction of the legacy. The husband, however, might release the legacy, and his release would be good, as against the wife, and in that case a Court of Equity could not interfere to prevent the effect of the release.

During

During the coverture the husband has an absolute and actual interest in the legacy bequeathed to his wife, and it must be admitted, that if the legacy, in this case given to both, had been actually reduced into possession by the husband, the wife's possible and contingent interest would be completely barred, and the present question could not have arisen.

It was submitted that what the Court below appeared to have considered as a proposition of law, in deciding this case, that it was a sort of joint tenancy in the husband and wife, was not maintainable, and the cases and dicta cited shew that that proposition cannot be supported. In another point of view, it was inquired what benefit passed to the wife under this bequest? And it was said to be clearly a mere contingent and possible interest only in case she should survive the husband, and the husband should not have previously reduced it into possession. It was thereupon insisted that if that were the only interest which she takes under this bequest, the 17th section of the Act puts the Defendant out of Court, because it has contemplated that very case, providing that where there is a legacy given to *A. B.*, and upon a contingency happening then over to *C. D.*, *A. B.* must pay the whole duty on the legacy as on an absolute bequest to him. And although the law has there provided that if *C. D.* takes afterwards, by reason of that contingency, as he would, do, supposing it had been an absolute bequest, and would therefore be liable to the higher rate of duty, it is remarkable that

that there is no provision in the Act for *refunding* any part of the duty taken, if the last taker should be chargeable with less. Supposing, therefore, the Defendants could establish, though it would be very difficult in point of law to do so, that the wife has a contingent interest depending upon the death of the husband in the legacy, not reduced into possession on her surviving him, their case would not be advanced by any argument deducible from that hypothesis, because the husband must in that case pay the whole of the higher duty in the first instance.

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The *Attorney General*, in conclusion, submitted generally on the whole, therefore, that in case of a gift of personalty to the husband and wife, the husband takes the whole interest, whether he reduces it into possession or not, and there would be great doubt whether the wife would take any interest, but supposing she would, as the case was put in the Court below, it would be the same thing. Admitting that some benefit was intended for the wife, and although the legacy in case of her death would not have lapsed, as her surviving the Testator would probably have entitled her to take it, still that does not at all advance the argument of the Defendants, if it be established that the immediate benefit of this bequest is for the husband, and for the husband alone, and that he in point of law takes a beneficial interest in the entirety at once, in effect, on the death of the Testator, whatever possible future and remote interest the wife at that instant might have in it, because, during the coverture, the husband is the absolute

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owner of the property, and might at any moment defeat that interest of the wife, and take the whole to himself. It was also strongly contended, that in a case like this the duty payable by the husband could not be made to depend, as between the Government and these executors, upon the question, Whether he should choose to reduce the legacy into possession or not; and the whole tenor of the statutes shewed that it was intended that the Crown should take the duty according to the earliest available state of the funds after the death of the testator. The executors are bound to pay the legacy-duty at the time when the legacy is retained. And here it is found, that there has been already, in fact, an actual retainer of this legacy by the executors *for the husband*, to whom they are thereupon bound to account, as they would indeed have been, even supposing him not to have been himself one of the executors. He has, however, being himself an executor, actually reduced it into possession for his own benefit.

For these reasons it was urged that the Crown was entitled to demand the higher duty for the whole of the residue bequeathed by the will.

In support of the judgment of the Court of Exchequer, on the other hand, it was submitted, that the arguments now used, as to the quantity of interest taken by the husband and wife, as distinct from each other, founded on the old common law doctrine, applicable to a state of property wholly different from that in which personal estate is placed in modern times, when these Acts of Par-

liament

liament were passed, could have no application or bearing on such a question as the present, in the state in which the property of this country now stands, and with reference to the particular objects and purview of these Acts of Parliament. Much stress was laid on the circumstance of the judgment in question, having been solemnly and maturely formed, after a second argument, by the Court of Exchequer, a Court peculiarly conversant with fiscal questions and the language and construction of Acts of Parliament imposing duties, and from the nature of its jurisdiction peculiarly acquainted also with those equitable principles, upon which all questions of property in this country, with very few exceptions, are at the present time considered and determined.

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It was urged that to succeed, the argument for the Crown must show that this is not to any extent or in any respect a bequest for the benefit of a child of the testator. Adverting to the fact found, that the Defendants *Bacchus* and *Priscilla* his wife, and *Mashiter*, being the executors, had possessed themselves of the legacy, and had retained the same, in the words of the bequest and of the statute, "to and for the use and benefit of the person or persons entitled thereto" (naming them), it was insisted, that they must be considered to have taken possession of this property for the actual and immediate benefit of the persons expressly declared to be entitled to it by the will of the testator's son-in-law, *George Bacchus*, and his (the testator's) said daughter, *Priscilla*, his wife, their

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executors, administrators, and assigns, and for their absolute benefit.

It was submitted, that *Bacchus*, the husband, could not, as had been suggested, acquire the absolute property in this residue whenever he might choose to do so by reducing it into possession, for that *Mashiter* would be a necessary party to all that should be required to be done in order to enable *Bacchus*, the husband, to obtain the entire dominion over it. But inasmuch as it is not found that he has done any act by which he has enabled *Bacchus* to treat the property as exclusively his own, nor that *Bacchus* has in fact done any such act, the facts of the case are not sufficient to shew that these three persons possessed themselves of the property for the benefit of any parties but those who should be ultimately entitled to it. The reducing it into possession necessary to support the main argument on the part of the Crown, must be shewn to have been effected by some act done by the husband to the exclusion of the wife. Here is no act done by the husband either to the exclusion of the wife, or the exclusion of the person who is joint-executor with him and his wife; and therefore supposing it to be necessary that the property should appear to be reduced into possession, it is not found in the case that that reduction into possession has taken place here. That however is in effect indeed insisted on by the argument to be unnecessary, for it is broadly said to be enough that the residue is merely given to them both to make the husband chargeable with the highest duty on the whole amount.

amount. That, it was contended, was an erroneous proposition, for the interest of the wife must be considered in estimating the amount of the legacy-duty payable. That she had an interest was clear, for if the husband should require of the Bank that the funds standing in the names of the executors for the benefit of the residuary legatees, should be transferred to him or his order, there can be no doubt that the Bank would refuse, and would be justified in refusing, because they can take no notice of that residuary clause, nor can they enquire for whose benefit it may be meant. They find this money in the names of *Mashiter* and *Bacchus* and his wife, and it is therefore necessary they should all join in the transferring of the stock. If *Bacchus* and his wife should have agreed in doing so, still it would be necessary that *Mashiter* should concur, and until his concurrence were obtained, there could be nothing done which would be effectual either in law or equity, to reduce the legacy into possession, or which would be equivalent to reducing it into possession. Then supposing *Mashiter* ignorant of the duties imposed upon him in respect of his executorship, and that he were by his answer to a bill in the Court of Chancery, to submit to do whatever he should be directed to do, the directions of a Court of Equity would be, that he should not join in a transfer of the stock to *Bacchus*, because as he must consider the whole trust and duty imposed upon him by the testator, whose trust he had accepted, he would not be warranted in doing any act which should deprive Mrs. *Bacchus* of her share of the legacy, it being given and intended for her absolute

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lute benefit, as well as for the absolute benefit of the husband. So far therefore from there having been any laches on the part of the husband in reducing the legacy into his possession, he had in fact no power by himself alone to do so.

It was submitted, that every argument adduced to shew that the Crown was entitled to 10*l.* per cent. upon the whole, was equally applicable to shew that it was entitled to receive only 1*l.* per cent. upon the whole, and that the Court of Exchequer as a Court of Equity, had considered the question with that equitable view which no doubt was in the contemplation of the legislature when these acts passed. If *Mashiter* had made any application to a Court of Equity for directions, the Court would look to all the circumstances attending and consequent upon the marriage-contract and the state of the family, before they would have given any directions, and then they would have provided for appropriate settlements, so as most fully to carry into effect a general equitable arrangement for the interests of both parties, without regard to this supposed legal claim of the husband. The will of the testator being to give this legacy for the absolute and mutual benefit of both, the two persons named would have been considered sufficient to warrant a Court of Equity in so determining between them. If there was an absence of all other circumstances, there can be no doubt that the settlement decreed by a Court of Equity would be made with a view to a division of the fund by equal moieties, that the husband should have it for life, the wife for her life if she survived,

survived, and that it should afterwards go for the benefit of the children, who may be considered as the ultimate objects of the bequest. There is no reason for the testator giving any thing to the son-in-law, except as the husband, and through him for the benefit of the daughter. There is no interest in the husband but as connected with her benefit. Admitting that it might not perhaps, now that it has been already determined not to be so, be the just view of the case, to argue that there is only a duty of 1% per cent. payable on the whole of the bequest, and assuming that the Court of Exchequer have drawn the right line in saying that the legacy must be taken to have been meant to be joint, and to enure for the benefit of both of them, (for it is upon that principle that they have drawn the line which a Court of Equity would have drawn in the absence of all circumstances tending to shew that anything was intended to the contrary,) and that, in respect of a subject peculiarly within the cognizance of that Court, it would require a very strong case in argument, to disturb the maturely considered judgment already given.

He then adverted to the statute of 31 Geo. 3, as throwing light upon the intention of the legislature, if there was anything doubtful in the words employed, observing that that statute is not repealed as to the 16th and 17th clauses.

[*Lord Chief Justice ABBOTT*.—The subsequent acts repeal the duties only. That distinction prevails

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vails in all the Tax Acts. They repeal only the duties, leaving all the rest of the acts in force by some such clause as there is here, connecting the duties under the new act with the clauses of the former statutes.]

Referring to the clauses of the statute adverted to imposing penalties and forfeitures, it was insisted that those were still in full force, and that therefore every mode of proceeding under that act, by fine, forfeiture, information of debt, &c. had been reserved to the Crown; the 16th and 17th sections, imposing a duty in two particular instances not as a power, provision or regulation, but as a precise duty under particular circumstances, viz: in case of a contingency and a case of joint-tenancy. By a later Act of Parliament repealing all the duties given by that former act, instead of clauses giving in words the particular duties, there is a schedule of all the duties which are thereafter imposed, embracing every possible case that can arise wherein any duty is required to be paid.

It was submitted upon this part of the case, that according to the tenor of that statute, it could not be contended that the joint-possession of the husband and wife gives the husband the entirety, for that it was inconsistent to argue this question on any construction of the old rules of law, so as that the wife must be considered as having only a contingent interest. In fact, the benefit of the legacy devolves on her from the moment

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moment of the death of the testator, as fully as if she had never contracted marriage, and so the testator clearly meant to give it. Common sense points out the distinction to be observed in construing this statute between the intended object of the bounty of the testator, the person for whose benefit, in the words of this Act of Parliament, the legacy was intended, and persons who by consequent operation of law, might also derive benefit from it or be entitled to a legal interest in it. It is with reference to the immediate object of the testator's bounty that the act, in this respect, applies, and that is clearly shewn by the terms of the 16th and 17th sections of the 36 Geo. 3. ch. 52, to have been in the contemplation of the legislature.

[ABBOTT, *Lord Chief Justice*.—It certainly does appear to me, that the real question in this case is, whether the duty is to be calculated according to the degree of relationship which subsists between the testator and the legatee, or an intestate and his kindred, (whether the benefit be conferred by express bequest or by the operation of the statute of distributions,) or whether it is to be calculated with reference to marital rights. If the latter were to be considered in the calculation, I confess I do not see how the proposition is to be sustained, that where a legacy is given to a married daughter she is to be called on to pay only 1*l*. per cent. although the husband may dispose of it.]

Upon the case in *Rolle* it was observed, that it
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was altogether inapplicable and distinguishable: and the case of *Back v. Andrews* (a) was cited where it was held that a husband could not alien a moiety taken by him and his wife by entireties, so as to bind the wife.

In *Littleton* (chap. "Of Remitter", Sect. 660), it is said, "If tenant in tail enfeoff a woman in fee, and dieth, and his issue within age taketh the same woman to wife; this is a Remitter to the infant within age, and the wife then hath nothing, for that the husband and his wife are but as one person in law. And in this case the husband cannot sue a Writ of Formedon, unless he will sue against himself, which should be inconvenient; and for this cause the law adjudgeth the heir in his remitter," &c. And again, (Sect. 666.) "Also if a woman seised of certain land in fee taketh husband, who alieneth the same land to another in fee, the alienee letteth the same land to the husband and wife for term of their two lives, saving the reversion to the lessor and his heirs; in this case the wife is in her remitter, and she is seised in deed in her demesne as of fee, as she was before, because the taking back of the estate shall be adjudged in law the fact of the husband and not the fact of the wife, so no folly can be adjudged in the wife which is covert in such a case."

In every case in which a wife can be seised of

(a) 2 Vern. 120.

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any thing to her benefit, unless there is a direct interposition of trustees who have dominion over the property, the only way in which she can enjoy it is through her husband, which is for the benefit of both ; that appears to be a general proposition of the English law, and when it is admitted that this legacy would have been subject to the duty of only 17. per cent. if left to the wife alone, every thing is admitted which is necessary to lead to a decision in favour of these parties who are Defendants on this record. In that case also the husband would have it by operation of law, just in the same way he may take it in the present case. It was for the benefit of both the husband and wife that this bequest was so made, and it is obvious that the daughter's interest was not lost sight of. The son-in-law has nothing but as the husband of that daughter.

It was submitted, that the entire onus lay on the Crown in this case, that it was not for the Defendants to establish a case till it had been shewn clearly that the Crown is *prima facie* entitled to this larger duty.

It was finally urged that it would have been easy for this Act, which has been so frequently altered, to provide expressly for the case of married women in such circumstances, but when the legislature says that that which devolves to the benefit of such persons shall be charged with a certain duty, they have done all that it was necessary for them to do under their meaning clear, never losing sight of the equitable interests of parties,
 which

which are always considered in determining such questions affecting the judicial disposal of the bulk of all property in the kingdom, contemplating the great probability of a married daughter being the object of the bounty of her father, and not meaning to make a distinction in consequence of the accident of her marrying before or after the death of the testator, conceding the admission claimed by the *Attorney General* would be to admit that in the one case 1l. per cent. only is imposed upon the whole, and it is altogether improbable that a testator who had full dominion over his own property, should mean to make such an extraordinary distinction between two daughters, one happening to be married, and the other unmarried at the time of his death. Upon the whole it was urged, that the whole question would turn on this, whether the Act of Parliament had drawn a distinction between the effect of such a bequest in law and equity, and had regarded the intention of a testator to give a benefit to a particular individual? The words are not to whom it shall be given, but the person for *whose benefit* it shall be given, or pass, or devolve, the very largest and most liberal words that can be used to exclude the notion of strict legal rights, and to let in the question of equitable interest and of the testator's intention. This legacy has devolved according to the practice of Courts of Equity, and the course contemplated by that Act of Parliament, for the absolute benefit of these two individuals.

It was pressed in conclusion, that it was sufficiently hard that the husband should be called
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by the Sheriffs of *Coventry* to the *Deputy Remembrancer's* Report (a) in the matter of this extent,

Jervis obtained an order on the same day on the behalf of the defendant and his sureties, for confirming the Report, and requiring the Sheriffs to shew cause why they should not pay to the Solicitor of the Stamp Duties the sum of 513*l.* 0*s.* 4*d.* the amount of the taxed costs of the Crown in this cause out of the sum of 1,290*l.* 1*s.* 9*d.* reported to be in the hands of the said Sheriffs, and, also, why they should not pay the sum of 777*l.* 0*s.* 11*d.* (the residue) to the Defendant or his sureties.

The Sheriffs of *Coventry* were further, by the same order, required to shew cause why it should not be referred to the *Deputy Remembrancer*, to calculate interest upon the sums of money levied or received by the late Sheriffs of *Coventry* or their Under Sheriff, from the Defendant's effects, and retained by them beyond the payments or remittances to, or on account of the Commissioners of Stamps, in respect of the debt due from the Defendant to His Majesty, and beyond their poundage and their charge allowed for their extra trouble and expences; and why the said late Sheriffs or their Under Sheriff should not be ordered to pay the amount of such interest to the said Defendant or to his said sureties, or one of them: and why it should not be referred to the said *Deputy Remembrancer*, to tax the costs of the said Defendant

(a) Vide *Rex v. Villers*, ante, Vol. VIII. p. 587.

and his sureties of, &c., occasioned by the several applications to the Court as to the poundage and charges of the said late Sheriffs and the proceedings thereon: and why the same, when so taxed, should not be paid by the said late Sheriffs of *Coventry* to the solicitor of the Defendant and his sureties.

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Hullock, Serjt., *Tindal*, and *Parke*, for the late Sheriffs of *Coventry* and the Under Sheriff, now shewed cause, upon an affidavit made by the Under Sheriff. The material statements in that affidavit were, that the Defendant, as Under Sheriff, received into his hands in *May* 1806, under the writs of extent, the sum of 5,177*l.* 6*s.* 11*d.* in money and bills of exchange (many of which bills were not then due), that in the same month he voluntarily remitted to the *Receiver General* of Stamps, a banker's draft for 4,500*l.*, on account of the extent which was more than then appeared to be due from the Sheriffs to the Crown, after deducting what the Deponent then believed to be the usual poundage and expences; that between the following *June* and *November* the Deponent, as Under Sheriff of *Coventry*, received the further sum of 1,686*l.* 14*s.* 6*d.* and that, in the mean time (on the 1st *October*), he remitted (as before) 1,500*l.*, being, &c. (as before)—that between said month of *November* and the 7th of the following *February*, he received 1,378*l.* 19*s.* 2*d.*, of which he remitted on that last mentioned day (as before) 900*l.*—that the whole of the money received under the writs of extent was not received by the Defendant until the latter end of the year 1808, and that he had in the interval accounted from time to time with the then successive

successive solicitors of stamps. That in 1809 the Deponent made out a general account when the present applicants objected to the allowance for poundage which had been made by order of this Court, and to the claim of the Deponent for extra costs, which the Deponent proposed to refer to the two clerks in Court, but the proposition was rejected. That the Deponent, on having looked over the accounts, considering that there was a balance of £800. due to the Crown, paid that sum to the Receiver-General of Stamps in *September* 1810.

The Deponent in his affidavit then proceeded to state, "That from time to time as the monies arising from the said writs of extent were paid into his hands, he deposited the same in the hands of a Banker in *Coventry* who had allowed no interest thereon, and that neither the Deponent, nor the said Sheriff, nor either of them, had made any interest or advantage of the possession of the money under the said writs of extent or either of them, in any way howsoever."

The affidavit then referred to the various proceedings in this matter which had from time to time been brought before the Court, and particularly the reference by order of the Court in 1810, of the Sheriff's claim for poundage and extra charges, and the report thereon in *May*, 1811, wherein the Sheriffs were declared to be entitled to 565*l.* 18*s.* 11*d.* for extra costs and charges beyond poundage, and the exceptions to that report with the reference of the allowance therein to the

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Register of the Court, and his award in *April*, 1818, allowing 404*l.* 14*s.* 6*d.* to the Sheriffs for extra costs and charges, with a statement that he considered that the residue of the sum allowed by the Deputy Remembrancer, should be charged for agency and not for Sheriff's charges.]

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It was also stated, that the Deputy Remembrancer had since taxed the Deponent's Bill as agent for the Crown at 171*l.*—and “ that in consequence of the proceedings from time to time taken by the Defendant and his sureties, the Sheriff and Under-sheriff had been put by the expences of the Deponent's journeys, fees to counsel, and the Deponent's bill of costs, including his Clerk in Court's bill, to an expence of upwards of 1,000*l.*”

The Deponent concluded by stating that he had been always ready [to settle] and desirous of settling the accounts and paying over the balance to the Crown, and that he had been informed and believed, that neither the Defendant nor his sureties had been charged with interest upon any part of the money due to the Crown, but that they had on the contrary, been allowed a per centage of 5*l.* per cent. on the whole or part of the debt.

Upon the statements contained in this affidavit it was contended, that there was no foundation for any part of the present rule which was now sought to be made absolute,—that no case had been made out against the sheriffs of fraud or contumacy, nor

any such improper conduct in retaining the money as was necessary to bring them within the principle of the cases which furnished authority for compelling the holders of balances to pay interest ; on the contrary, the detention of the money was wholly owing to the litigious conduct of the applicants, and, during the whole period, it was sworn that no interest had been made by the money, nor advantage derived to the Sheriffs by keeping it. And they distinguished this Case from those where in Courts of Equity interest has been ordered to be paid under certain circumstances, in that this was the case of a sheriff in performance of his duty as a public officer, which did not raise a trust.

It was urged that even if the Sheriffs had, during any part of these proceedings, been mistaken in respect of their rights as to questions of law which could only be determined by the Court, upon argument, that would afford no reason for the present application ; for that the only fair foundation on which it could rest would be the misconduct of the parties resisting the application.

As to the costs of the various proceedings by motion necessarily had from time to time, it was insisted that there was no pretence for that part of the rule ; for that it was without precedent or principle to support it, that an after application should be made for costs of by-gone motions not provided for at the time when they were disposed of: and moreover none of the various motions on
either

either side had been made on terms of payment of costs by one party or the other, and unless a motion were so made it was the rule of *Westminster-Hall* not to give to either party the costs of such motions: they therefore insisted that the present rule ought to be discharged.

1822.

 The KING
 v.
 VILLERS.

Jervis, Clarke and Comyn, in support of the Order, contended that the facts stated in the affidavit of the sheriff furnished no answer to the present application. They insisted that it was the Sheriff's duty to have paid all the money received by him into Court, or to have paid it at once over to the Crown, and that not having done so he was to be considered as holding the balances as a Trustee for any party who should be entitled to it. On that ground he would, on the principle of all the authorities, be compellable to pay interest on the whole amount for the time during which he had so retained it. For the sake of the general principle deducible therefrom that a party keeping possession of the money of another is chargeable with interest, they cited the following authorities: *Dawson v. Parrot* (a), *Ratcliff v. Groves* and another (b), *Longmore v. Broom* (c), *Franklin v. Smith* (d), *Brown v. Southouse* (e), *Piety v. Stace* (f), *Perkins v. Baynton* (g), *Beaumont v. Boulbee* (h), *Rooke v. Hart* (i),

(a) 3 Bro. Ch. Ca. 236.

(f) 4 Ves. 620.

(b) 1 Vern. 196.

(g) 1 Bro. Ch. Ca. 375.

(c) 7 Ves. 129.

(h) 5 Ves. 485. 7 ib. 599.

(d) 3 Brown, Ch. Ca. 433. 11 ib. 358.

(e) Ib. 107.

(i) 11 Ves. 58.

Mosely v. Ward (a), *Potts v. Leighton* (b). In *Trever v. Townshend* (c), the Court considered that money lying with the banker of a tradesman was to be treated as part of his stock in trade, and in the case "*In the bankruptcy of Hilliard*" (d), it was held, that letting money lie at a bankers was in itself making an advantage of it. They also referred to the cases of *Littlehales v. Gascoigne* (e), *Forbes v. Ross* (f), *Peacock v. Redington* (g), *Raphael v. Boehem* (h), *Cottering v. Daly* (i), ——— v. *Jolland* (k), *Ex parte Townshend* (l), *Ex parte Baker* (m): and they urged that these Cases furnished a principle which would apply to the present, for they submitted that a sheriff who had acted as these Sheriffs had done was in the same situation with respect to the parties who had been prejudiced by his conduct, between whom and him there was necessarily such a privity existing as to render him liable to make good any loss, or repair any injury which had been the consequence, as if he were a Trustee. In this Case they insisted that the Sheriff was at once both the agent of the Crown and of the Crown debtor, and as such liable to account with either where either should have a well founded claim against him. Upon this part of the Case the Court were referred to the Order made by them in the case of the *King v.*

(a) 11 Ves. 581.

(b) 15 Ves. 273.

(c) 1 Bro. Ch. Ca. 384.

(d) 1 Ves. Jun. 89.

(e) 3 Bro. Ch. Ca. 73.

(f) 2 Ib. 273.

(g) 5 Ves. 794.

(h) 11 Ves. 92.

(i) 6 Ves. 488.

(k) 8 Ves. 72.

(l) 14 Ves. 470.

(m) 2 Rose 440.

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from time to time in this Court and disposed of. It would be inconvenient and might frequently lead to great injustice, if the Court at such distance of time should make orders respecting the costs of former motions on any subsequent occasion after the discussion of a matter of which the merits must necessarily, or in all probability, be forgotten.

Upon the other parts of this application we have no doubt or difficulty, except upon one point. A part of the charges now complained of is the Bill of *Mr. Hanson*, the former solicitor of the stamps, and with that the Sheriffs of *Coventry* can have nothing to do, but as far as relates to the costs of the taxation of their own Bills, which the Under-sheriff is required, by this rule, to pay, we see no objection to making an order now for that purpose. It would be a very lamentable thing if we could not do so, because the Court would otherwise frequently be unable to perform fully a very important duty cast upon them, that of protecting effectually the subject from extortion, in the conduct of the officers of the Crown, and of all other persons who may be engaged to act under them in the performance of their duty.

As to the question of the Sheriffs being required to pay interest upon the amount of the various balances which have been kept in their hands, our only doubt has been in respect of the time from which we should order it to be paid. We have determined however, that it should be allowed from *July*, 1810. The Sheriffs had been allowed pound-
age

age up to that time: and during the preceding period, they were consequently, perhaps, warranted in considering that they were entitled to retain the money in their hands. After that time there was certainly no pretence for such a claim.

For my own part, if I were to determine this question alone, according to my individual opinion, I should be disposed to make the Sheriffs pay interest on all the money which had been received by them from the Defendant's effects, beyond what had been found sufficient and necessary to satisfy the demands on account of which those effects had been taken by them; for I do not understand that because a Sheriff conceives erroneously, that he has a right to retain property in his hands, he may therefore when ordered to refund it, be allowed to keep back the interest upon it, which might have been produced by it if properly managed.

However that may be, it is quite clear that from the moment when the Crown had been satisfied its debt, the sheriff was bound immediately to pay over the clear residue of the monies in his hands to the parties entitled to it: and if he do not do so, but by creating delay, which enables him to retain it, he keeps it in his possession and has the use of that money, it is quite clear that he ought to pay the parties interest for it.

When in *July*, 1810, the Court determined that the Sheriff was not entitled to retain the money, deciding

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deciding that his claim for poundage was unfounded, the party to whom the money belonged acquired a right immediately to the money in the Sheriff's hands, and by consequence he became entitled to interest for every day of the time when the Sheriff afterwards kept it from him.

Then the delay and litigation, by which the Sheriff has since continued to protract the payment, renders the detention much more cruel and hard upon the party who has been harassed by such proceedings, in every one of which the Sheriff has failed, or at least in every important instance. If I could do so, I would certainly make the Under-sheriff fully indemnify the Defendant *Villers* and his sureties, by paying all their expences and costs to the utmost extent.

The cases which have been cited certainly furnish a principle which may be properly applied to this question, for they establish propositions from which we may assume, that at the instant when the rights of the Defendant, in the case before the Court, were decided, the Sheriff might be considered as having from that moment become a trustee for him and those claiming under him; and if so, he was bound by the duties of that situation, and liable to all the consequences and equities to which, in that character, a Court of Equity would consider him to be subjected. We have before in one case already acted upon that principle, for in the case of the *King v. Bach* we ordered the Solicitor of the Stamps, Mr. Hanson, to pay interest

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on all the money which we considered that he had improperly received for his demand of costs from the party in that case, for the whole time that he had received and retained the amount. *Hanson* was the solicitor for the Crown in that case. In this case the party complained of is an Under-sheriff entrusted with the execution of the Crown Process. He is an officer of the Crown acting under the authority of this Court. He stands therefore in a much more tangible situation in respect of the money in his hands, than the Solicitor for the Crown, in the case I have adverted to, and he has less colour or pretence for having retained the money in respect of which it is now sought to charge him with the interest.

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 VILLERS.

It has been said (and that was much pressed upon the Court) that no interest or advantage was made by the Under-sheriff during the time of his keeping this money in his hands. On that part of the case the answer is, that for the purpose of this application it is enough to shew the Court that he might have derived advantage from it. Indeed there can be no doubt that the merely retaining it during all this time in his hands or at his banker's, is of itself an advantage, whether he have availed himself of it or not; and even if he had not in fact made any use or interest of the money, the very act of keeping it is in itself quite sufficient, in a case of this nature, to give the party entitled to it and who is thereby deprived of the benefit of it, a right to the indemnity he seeks for the loss which he has sustained.

[His

[His lordship then observed, that the affidavit which had been put in by the Under-sheriff, was not at all calculated to satisfy the Court of the facts which the Deponent would have had them infer from it. That it was loose and inconclusive both in assertion and negation, as in not stating the name of the banker with whom it was said the money had been deposited, and denying in a vague manner, the deriving of advantage from retaining it, advantage being a term of very wide and convenient signification; and that the fact itself, as stated, was inconsistent with even the bare possession of the money.]

In this affidavit (continued his lordship) I cannot find any sufficient reason for believing that the Under-sheriff has not in fact derived some advantage or at least some accommodation by keeping the balance so long in his hands, if that were necessary to justify the order which we are about to make, or were required to be shewn to us as a circumstance without which we could not determine this case, as we shall have done, in disposing of the motion before us by making the Rule absolute in that respect. In my view of the question, however, it is not necessary that any such fact should be made out. I am clearly of opinion that we may proceed entirely in making the order we are about to pronounce, upon this single ground, — the very act of retaining the money by the Under-sheriff, under the circumstances of this case, even if it were not in any positive respect advantageous to him; because if that were
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not so, yet as it necessarily prevents the party entitled to it from himself making interest or any use or other advantage of it, it is an improper and unjust retainer, and gives him a claim to indemnity. Now the only way in which we can act, so as in any manner to indemnify *Villers* and his sureties, is to order the Under-sheriff to pay to *Villers* interest on the balance from the time when his right to it was ascertained, and also to pay him the costs of this application; I am therefore clearly of opinion, that to that extent this Rule must be made absolute.

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VILLERS

GRAHAM, *Baron*.—I entirely concur. It is a contradiction in terms, to say that a man has kept for a considerable period, a large sum of money belonging to another person, in his own private banker's hands, and that he has done so without any advantage to himself. It must be advantageous; but I do not require the aid of that circumstance in forming my opinion in this case. It is quite enough that it is the duty of the Court, in a case of this sort, to protect the Crown debtor from oppression and extortion by the officers of the Crown, either by exactions of what is not due to them, or keeping back what is due from them under colour and pretence of bills of costs and charges incurred, operating to the utter ruin, too frequently, of the parties who become the victims of such fraudulent conduct, by means of such flagrant abuse of the process of the Court. When in a case of this sort, where it appears that the money
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of the unfortunate man who has fallen into the hands of persons who do not scruple to attempt to take such undue advantage of his situation, has been kept in their possession for so long a time, to his great loss, it becomes the imperative duty of the Court to give him immediate redress, and that to the fullest extent and in a summary way, without putting him to the expence and delay of pursuing any more circuitous mode of proceeding for that purpose, by at once ordering, as we now do, the money to be paid to him with interest upon the whole balance, due during the whole period of its detension from him.

I wish we had it in our power to go further in affording him more complete redress, by awarding him more in the matter of costs than we have the power to do, for the necessity of the present measure would be an ample reason for alleviating the burthen of it by any retrospective order that we could make; but I am sorry we can only give him the costs of this application, and of taxing the bills.

Wood, *Baron*.—I am certainly of the same opinion; but I think we should not give the Defendant interest beyond the year 1810; for before that time there was some colour for keeping possession of the money. Afterwards there was certainly no pretence for it; and from that time the Sheriff was acting contrary to what was his plain duty in keeping it any longer in his hands. Notwithstanding

ing that, he has, under various pretences, kept it ever since, and for his own accommodation most clearly. Whether he derived any positive or considerable advantage from keeping it I will not enquire; it is enough that he kept it contrary to his duty, to satisfy us that he ought to indemnify the Defendant by paying him interest.

We ought, I think, to give the Defendant the costs of this application, and of the taxation of the Under-sheriff's bills.

GARROW, *Baron*, concurring, added, I am well satisfied to find the Court decides this question on the broad principle of the Under-sheriff holding the money after it had become his duty to pay it over, independently of the fact of his having made interest upon it; for, whether he did make interest of it or not, by having prevented the person who was entitled to it from making use of the money himself for a long period, during which he might have made interest of it, sufficient ground is furnished for making the Under-sheriff pay interest to him.

I will here repeat now what I said on a former occasion, which has been alluded to, (*The King v. Beck*), that I hope this will prove a salutary lesson to parties in similar situations, of whatever description of persons they may be, and that it may teach them that such experiments are not to be made with impunity, and that the Court will anxiously take care to afford protection and indemnity

1822
The King
v. Beck

demnity to persons who so much need it as those who are in the unfortunate situation of the Defendant in this case, and that it is for the interest of parties, who are tempted by such opportunities, not to endeavour to avail themselves of them. Can any one believe that the power of lodging money in the hands of a banker in the country, by which a man's pecuniary facilities and resources are proportionably augmented, is not advantageous to him? It is a mockery of the understanding to make such an assertion. Such a deposit may enable him to make interest of other money, which, but for this sum, he must have lodged for other purposes with his banker.

I trust also, that this proceeding may be the means of preventing such causes from loitering in this Court as we have sometimes seen they do, and that a long course of litigation for purposes of mere delay, may not always turn out a profitable speculation. I readily concur in giving the parties applying their costs of the present application, and am sorry that we cannot do more for them.

Per Curiam,

Rule Absolute,
With Costs.

GRIPPER

GRIPPER v. COLE.

1823.

Tuesday,
4th February.

PRICE having on a former day obtained a Rule to shew cause why an Attachment should not issue against the former attorneys of the Defendant (an insolvent debtor) for not delivering their bill of costs in this and other matters wherein they had been concerned for the Defendant, to the Defendant's present attorneys, pursuant to a Baron's order that they should deliver such bill within three weeks from the date of the order;

Richards shewed for cause, that the bill of costs had since been delivered according to the order, and the affidavit which stated that fact alleged that it was in consequence of the illness of one of the attorneys against whom the attachment had been ordered, that the bill of costs had not been delivered in compliance with the order; and that their clerk had in consequence of this Rule, made out the bill in the best manner he could.

Price submitted that as the delay of the parties sought to be attached had rendered the present application *necessary* to obtain the object of the order, the costs of the motion should be ordered to be paid by them; but

The Court (consisting of GRAHAM and GARROW *Barons*) were of opinion that as a sufficient reason had been given for not obeying the original order, which

A Rule to shew cause why an attachment should not issue against the former attorneys of a defendant in a cause for not delivering their bill of costs to the Defendant's new attorneys, pursuant to a Baron's order, discharged, the bill having been delivered since the Rule was served on the parties; and illness having been assigned in the affidavit as the cause of the parties not obeying the order, the rule was discharged *without Costs*.

Such an order is not of a peremptory nature, nor absolute in the first instance.

1823.
GRIFFER
v.
COLE.

which was not of a peremptory nature (a), the Rule must be discharged without costs.

Rule discharged without costs.

(a) The Court determined when the motion was made, that it was not a rule absolute in the first instance.

In the Exchequer Chamber.

1823.

[ERROR FROM THE COURT OF EXCHEQUER.]

Monday,
10th February.

GILES v. The KING.

1821.
31st January.
An information in the nature of an action for a false return against a sheriff who had returned that he had seized the goods, &c. in- to the hands of his majesty, subject to certain prior executions, which return had the effect of de- priving the

THIS case now came on to be argued before the two Chief Justices, upon a writ of error brought by the Defendant below against the judgment of the Court of Exchequer, delivered at the sittings after Trinity Term, 1 Geo. 4. (a)

The Court at the commencement of the argu- ment directed the attention of the Counsel to the terms of the sheriff's returns to the writ of extent,

Crown of the fruits of its prerogative, priority cannot be supported if the return should be substantially true, although it might be bad in point of law.

The proper course in such a case would be, to procure the return to be quashed by motion for that purpose.

A Court of Error will not overlook an objection appearing on the record and special verdict, even where the parties may have so bound themselves as not to be entitled to insist on the objection.

(a) Vide the case of *The King v. Giles*, ante, vol. VIII. p. 293. et seq. where the Sheriff's return, as stated in the special verdict is set out fully, and the facts of the case are stated.

and

and the facts of the case as found by the special verdict; observing, that these raised a preliminary question, whether in fact there had been a false return made by the sheriff, admitting that if there were, an information filed against him by the *Attorney-General* on the part of the Crown, in the nature of an action for a false return, would lie, and might be supported.

1833.

Guise
The King.

Tindal, for the Crown, submitted, that it was not necessary to sustain this information upon the evidence that the return should be in all respects false in fact; and that it would be sufficient if the sheriff had mistaken his duty in point of law, and had made a wrong return, or one that could not be justified in law, taking upon himself the consequent responsibility. In this case the sheriff, he insisted, had by his return taken upon himself to say which of two parties had the legal priority of execution, and which of them ought to be first satisfied out of the Defendant's goods seized by him under concurrent writs. The result was, that he had of his own authority postponed parties who claimed a preference in respect of having their execution first executed, to others making a like claim, which in effect was equivalent to a return of *nulla bona*, the seizure of the goods being rendered unavailable by having been returned seized subject to the former writs, which had not in truth the priority ascribed to them by the sheriff in such return, and yet he had satisfied those writs out of the proceeds.

He submitted that if a jury should take upon themselves to decide what was properly a question of law, and should find contrary to law, it would be a false verdict. By analogy with such a case, a sheriff returning that he had acted under certain circumstances stated in his return which would raise a legal point, if upon the face of such return he should appear to have mistaken the law, whereby the party on whose behalf he should have acted would appear to have been prejudiced or to have sustained injury, he would be liable in such a case as for a false return in fact; and the present Plaintiff in error, he insisted, was precisely in that condition. So he would have been if he had returned that the property seized by him was subject to a mortgage or lien to which they were not legally liable.

In this particular case too it was observed, the present course had been the effect of an arrangement by consent between all the parties interested, in order to have the question fairly and finally disposed of and set at rest; and therefore it was not competent to any of them to get rid of the object of this proceeding by taking an objection of this nature to its form, especially the Plaintiff in error, against whom an attachment had issued, and was pending when the present course was suggested and adopted for bringing the question before the highest authority.

Jervis, for the Plaintiff in Error, supported the
objection

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1823.

12th February.

THE KING (in aid of Grant) v. KYNASTON and others, assignees of WILDMAN, a Bankrupt.

An obligor to the Crown by bond, conditioned to sell all such sugars as shall be delivered to him as agent for the sale and disposal of certain sugars, and to account for and pay over the produce of the sale of the said sugars, to &c. may sue out a writ of extent in aid, under the proviso in the 57 Geo. 3. c. 117. as upon a debt due from him to the Crown, being the balance of monies received by him between the date of his appointment and the time of issuing the extent arising from the sale of sugars delivered to him after his appointment, and previous to the date of the bond.

THE writ of extent in this case was tested on the 22d day of *October*, 1821. It recited a bond given to the Crown by *Robert Innes Grant*, dated the 24th day of *September*, 1821, in the penal sum of 60,000*l.* An inquisition taken the 11th of *October*, 1821, by virtue of a commission under the seal of the Court of Exchequer, by which it was found that *Grant* was on the day of taking that inquisition indebted to his Majesty in the sum of 12000*l.*, being his Majesty's money received by him arising from the duties of four and a half per cent. upon the produce of the *Leeward Islands*. It also recited another inquisition taken on the same day, by virtue of a writ of extent issued against *Grant*, by which it was found that *Wildman* was indebted to *Grant* and his co-partners in trade in the sum of 4554*l.* 17*s.* 10*d.* for principal and interest on three several bills of exchange in the said inquisition mentioned, which sum the sheriffs seized into his Majesty's hands; and the writ commanded the sheriffs of *London* in the usual form to take the said *Wildman*, and to inquire concerning his lands and personal estate, and to seize &c.

Upon this writ of extent in aid, an inquisition was taken on the 12th of *November*, 1821, by which it was found that *Wildman* was on the day of taking that inquisition possessed of certain Exchequer bills, therein stated to be appraised at 4500*l.*

4500*l.*, and of certain debts specified in the schedule to the inquisition annexed, all which the sheriffs seized into his Majesty's hands.

1823.
The KING
KYNASTON
and Others.

In *Michaelmas* term, *Wildman* entered his claim and cravedoyer of the bond and condition, the commission, the inquisition thereon, the writ of extent against *Grant*, the writ of extent against *Wildman* and the inquisition thereon, and craved a day till *Hilary* term, 1822, when his claim was withdrawn; and by leave of the Court the Defendants, his assignees, entered their claim and pleaded specially the bankruptcy of *Wildman*, and made title in themselves as assignees under a commission of bankrupt, dated the 15th *December*, 1821. And they further pleaded that the writ of extent against *James Wildman* was and is an extent in aid, sued and prosecuted by *Grant*; and that *Grant* was not at the time of suing out the said extent against the said *James Wildman* indebted to his Majesty "by the collection and receipt of any money arising from his Majesty's revenue for his Majesty's use for any duties or sums of money for the answering, securing, paying over, or accounting for, of which to his Majesty the said Robert Innes Grant was bound to his said Majesty by the said bond."

The *Attorney-General* on behalf of his Majesty replied that the said *Robert Innes Grant* was at the time of suing out the said extent against the said *James Wildman* indebted to his said Majesty by the collection and receipt of money arising from his Majesty's revenue for his Majesty's use, to wit,

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 The KING
 v.
 KYNASTON
 and Others.

wit, in the said sum of money in the said first-mentioned inquisition mentioned, for the answering, securing, paying over or accounting for, of which sum of money to his said Majesty the said *Robert Innes Grant* was bound to his said Majesty by the said bond.

The replication also denied the act of bankruptcy of the said *James Wildman*.

The rejoinder denied that the said *Robert Innes Grant* was at the time of suing out said extent against the said *James Wildman* indebted to his Majesty by the collection and receipt of money arising from his Majesty's revenue for his Majesty's use in any sum of money for the answering, securing, paying over or accounting for, of which to his said Majesty the said *Robert Innes Grant* was bound to his said Majesty by the said bond, in manner and form alleged in the replication.

These issues came on to be tried before the Lord Chief Baron and a common jury at the sittings after Trinity term 1822, at Westminster, when the jury found a verdict for the Defendants upon the issue on the act of bankruptcy, and for the Crown on the other issue, subject to the opinion of this Court upon a special case, with liberty for either party to turn it into a special verdict if the Court should think fit.

The special case stated that *Grant*, the prosecutor of the extent, was appointed by the Lords of the

the Treasury agent and receiver of the four and a half *per cent.* *Laeward Island* duties on the 10th of June, 1821.

1828.
The KING
V.
KYNASTON
and Others.

On the 24th *September* 1821, the bond mentioned in the proceedings was executed. The bond (with a surety) was in the usual form, and in the penal sum of 60,000*l.* The condition was as follows:—

“Whereas the Lords Commissioners of His Majesty’s Treasury have been pleased to appoint *Robert Innes Grant* to be agent for the sale and disposal of all the *sugars received in this country on account of the duties commonly called the four and a half per cent. duties.*

“Now the condition of this obligation is such that if the said *Robert Innes Grant* do and shall sell at the best price that can be obtained for the same, all such of the said *sugars as shall be delivered to him by the husband of the said duties for the time being*, and do and shall immediately after the sale of any of the said *sugars* deliver to the husband of the said duties an account shewing the terms upon which the said sugar has been sold, and do and shall within seven days after the *tenth* day of *October*, the *fifth* day of *January*, the *fifth* day of *April*, and the *fifth* day of *July* in every year pay into the *Bank of England* on the joint account of the husband for the time being of the said duties and the *Comptroller General of the Customs* for the time being a sum of money which shall appear by the

1823.

The KING
v.
KYNASTON
and Others.

the certificate of the said husband of the said duties for the time being, and the Comptroller General of the Customs for the time being, to be equal to the quarterly charges upon the fund *as far as the amount of the sales, or the value of the produce on hand or advised will meet the same*: and also, if the said *Robert Innes Grant* do and shall *within one month after the fifth day of July* in every year balance his accounts of the SALE of the SAID sugars for the year *immediately preceding*, and pay into the *Bank of England* in the names of the husband of the said duties for the time being and the Comptroller General of the Customs for the time being any balance that may appear to be due to the *Crown on the fifth day of July preceding*: and also if the said *Robert Innes Grant* do and shall upon demand enter into an agreement with the Commissioners of his Majesty's Customs in *England* for the time being, or any three or more of them, for the due performance *of his trust as agent for the sale and disposal of the said sugars*, and if the said *Robert Innes Grant* shall thereafter execute his said trust according to the terms and conditions of the said agreement, then this obligation to be void, otherwise to be and remain in full force and virtue."

At the time of the issuing the extent against *James Wildman, Grant* was indebted to the Crown in 15,164*l. 5s. 4d.*, being the balance (after deducting payments made) of monies received by him *between the date of his appointment as such receiver and the time of issuing the said extent arising from*

1898.


The King
v.
KYNASTON
and Others.

He contended that the fact of his being, at the time of the issuing the extent, a debtor of the Crown, and bound to the king by bond at the same time, was sufficient to bring him within the proviso of the act, although he should not then have been literally a debtor to the Crown by reason of any breach of the bond, which was not necessary to enable him to proceed against his debtors by extent in aid, notwithstanding the general restriction of that statute. It was enough for that purpose that he should be a simple contract debtor to the Crown by the receipt of money arising from his Majesty's revenue, and that he should be bound to his Majesty by bond for answering, &c. the particular duties to his Majesty, without regard to the time of such receipt of money with reference to the date of the bond.

He also insisted that *Grant* would have been liable on this bond to pay to the Crown the money which he was found by the special case to owe to the King at the time of issuing the extent, in case he had misapplied any part of the sums received by him under his appointment; and he cited the case of *The King in aid of Stuckey v. Gibbs* (a), as establishing that the receipt of the Crown's money by persons who have given bond to the King for paying over what they should receive, would entitle them, since the 57th Geo. 3., to sue out an extent in aid. In this case he submitted *Grant*

(a) Ante, vol. VII. p. 633.—3 M. and S. 502.

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had been delivered to him before the execution of the bond, for that no breach could be assigned in such a case. He urged that the condition of the bond was altogether merely prospective, and could not in any sense be construed so as to be given a retrospective effect. And even though it should be sufficient to support a proceeding against the obligor, it was urged that still it would not bring the Crown debtor within the exception of this proviso, for the condition of the bond must be read according to the rules of grammar, and if so it would be impossible to connect the bond set out in the special case with the debt there stated to be due from *Grant* to the Crown.

He therefore contended that this proceeding could not be supported, and that the verdict ought to be entered for the Defendant.

Parke in reply insisted, that from the object and tenor of the bond it must be taken to have been entered into in respect of all sugars which should be or should have been at any time delivered to the obligor: and he contended that it was not necessary to bring a Crown debtor within the exception of this proviso, that there should be any debt due from him to the Crown on the bond, or that there should have been any breach of the bond on the part of the obligor, and that the condition of the obligor was precisely that to which the proviso in the statute was meant to apply.

Cur. adv. vult.

GRAHAM,

GRAHAM, *Baron*, now delivered the judgment of the Court. His lordship stated the facts of the case and the terms of the condition of the bond, and having noticed the arguments on either side, proceeded as follows :

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The terms of the condition of this bond do certainly afford much ground for cavil, taking the language in a grammatical sense. We must, however, in these cases, look to the object and obvious intention of the party on either side in construing and giving effect to such bond. Now it was clearly not the intention here that the Obligor was to be bound to render an account of the sugar delivered to him, or to do any thing until there should have been a sale; and he is bound substantially and effectually to account for, and to pay or secure the proceeds of the sales. It is upon the sale and disposal that the Obligor is to account, not on the deposit of the sugars. That part of the bond by which *Grant* is bound to balance his accounts of the sales of sugars within a month after the fifth of July in every year, for the year preceding, explains the general nature of the obligation which he had entered into; and it shews, in my view of it, that the bond is sufficiently comprehensive to cover the sugars which had been already delivered; and if he had, after the execution of the bond, money in his hands arising from the sale of sugars delivered to him, although previously to the execution of the bond, still he would be clearly accountable to the Crown for the produce of such sales on the footing of this bond.

We

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We are therefore of opinion, that the verdict which has been found for the Crown ought not to be disturbed.

GARROW, *Baron*.—I have the authority of my *Lord Chief Baron* to say, that he concurs in the judgment which has been just delivered; and I am myself of the same opinion.

Per Curiam,

Judgment for the Crown.

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LLOYD v. NEEDHAM.

An Action on the case for a personal injury, in consequence of the negligent, careless, and improper driving of the horse and chaise of the Defendant against the Plaintiff, held to have been proper in form; although the evidence proved that the act was violent, and the injury which resulted immediate.

GRAHAM,
Baron, dissente.

THE Plaintiff brought this Action on the case against the Defendant, to recover from him a compensation in damages for the injury complained of in the declaration, which stated, that the Defendant was possessed of a certain gig and a certain horse then and there drawing the same, which said gig and horse were then and there under the care, management, and direction of the said Defendant who was then and there driving the same; nevertheless the Defendant then and there so carelessly, negligently, and improperly drove, managed, and directed the said gig and horse, and that the same by and through the carelessness, negligence, and improper conduct of the said Defendant in that behalf, then and there ran [against] and struck with great force and violence upon, over, and against the said Plaintiff, who thereby was greatly cut and bruised, wounded and hurt, and became sick, sore, lame,

lame, diseased and disordered, and so continued for a long time, to wit, &c.; and by means of the premises she the said Plaintiff not only suffered and underwent great pain and anguish, but had been forced and obliged to incur and had necessarily incurred great expence for surgical and medical advice, &c. amounting &c. to 200*l.* and that the said Plaintiff was rendered wholly incapable of earning her future subsistence, to her damage of 1000*l.*

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The Defendant pleaded the general issue.

The cause was tried at the sittings for *Middlesex* in last Michaelmas Term, before the *Lord Chief Baron*. The Jury found a verdict for the Plaintiff, damages 250*l.*

On the trial the Defendant's counsel objected on the evidence given in support of the Plaintiff's case, that the form of action had been mistaken, insisting that the remedy for the species of injury proved by the witnesses was by action of trespass and not by special action on the case, and that the former being the proper and only mode of proceeding, the latter could not be maintained, and the Plaintiff ought therefore to be nonsuited.

The *Lord Chief Baron* took a note of the objection, but permitted the trial to proceed, reserving to the Defendant liberty to move to set aside the verdict if it should be found against him, and that a nonsuit might be entered.

Adolphus

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Adolphus having on the last day of the Term obtained a rule to shew cause,

The *Lord Chief Baron* now read his report of the evidence. His Lordship stated that the question was merely whether upon the evidence on which the verdict was founded the action was in form sustainable; and whether the Plaintiff might under the circumstances declare in case, or whether he must declare in trespass. His Lordship then stated with much minuteness, as much of the evidence as was considered necessary for determining the question of pleading raised by the objection.

The first witness called stated that he saw the Defendant on the day laid in the declaration, and so observed him as to be able to speak to his identity, driving his gig in a furious and violent manner on the wrong side of the road,—that the belly-band of the harness was loosened and hanging down—that he was alarmed for the Defendant's safety from the danger which he apprehended—that the witness (who was also driving a gig and following the Defendant) put his horse into a gallop in order to overtake him, to apprize him of his danger and prevent mischief—that after some time he with difficulty came up with him, and he then prevailed on him to stop and endeavour to adjust his harness—that when the Defendant got out for that purpose the witness was struck with the careless and extraordinary manner in which he conducted himself, as by throwing the reins carelessly on the horse,

horse, and in other respects; and he stated that the Defendant was not capable of stooping or of buckling the belly-band, and that on witness's request a foot-passenger did it for him. [The effect of this witness's general testimony was to shew that the Defendant was intoxicated.] The Defendant resumed his seat and drove on, the witness following, but the defendant drove now so violently that the witness lost sight of him in a bend of the New Road, after he had passed the turnpike opposite to Baker Street; the witness on coming up with the Defendant again found him out of his gig with a crowd round him. [His Lordship here stated shortly, that the result was that the Defendant's gig, still on the wrong side of the road, had run against the Plaintiff and her husband who were then crossing the road, and striking them both down had passed over the man, and the Defendant himself was thrown out; the consequence was that the man was killed and the woman very severely hurt. The Defendant was afterwards arraigned at the Old Bailey on the Coroner's Inquest on a charge of manslaughter, of which he was acquitted. Upon that trial, however, the witness whose testimony is now reported did not appear to give evidence.] His Lordship then proceeded to read the evidence of several other witnesses, all of whom concurred in stating that the Defendant had been driving a very spirited horse with great speed, sometimes on one side of the road and sometimes on the other—that he flogged him violently, and that the belly-band again got loose—that the chain was much tossed

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about by the effect of the horse's speed and the condition of the harness.

Some of the witnesses, who were on horseback, stated they could not overtake the defendant without galloping. Others of the persons called who saw the Defendant when near the spot where the unfortunate accident happened, which was opposite to the gate of the *Regent's Park*, stated that he was then pulling very hard at the reins, and apparently endeavouring to check the horse, leaning back in the gig with his feet against the dashing iron, apparently in great danger: and it was proved that the Defendant called out in the way of warning to some persons in the road. Some of these witnesses stated that the Defendant was intoxicated, as it appeared to them.

The general result of all the evidence was (and it was so admitted on either side in the argument which was founded on this state of facts) that the Defendant had been, for five or six hundred yards previous to the accident, urging his horse to a very dangerous speed, which he was endeavouring in vain to restrain when the misfortune occurred.

Jervis and *Lawes* now shewed cause in support of the verdict. They urged that the Plaintiff had adopted a proper form of action by declaring in case, and that the evidence supported the declaration. They urged that, if this was a case where the objection taken should be allowed to prevail, it must be because it was strictly necessary that
the

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the action must be trespass, and could not be maintained as an action on the case. They submitted that the cases on this point, which were certainly in some respects contradictory, established generally that under such circumstances as furnished the ground of the present action, the party injured might bring an action of trespass, but that he might notwithstanding waive the trespass, and have recourse to an action on the case. On the present occasion they insisted the action was grounded on the very great negligence that had been proved; and however violent the conduct of the Defendant in the first instance might have been before the accident happened, yet that as his desire and the efforts made to restrain and check the speed and spirit of the animal were apparent for some distance before the accident occurred, although originally and for some time previously he might have excited it, the general careless conduct of the Defendant, the want of the power of control over the horse, and the absence of will to cause mischief, (the force proved being employed to prevent not to create injury,) all being considered together, with the fact of his having been acquitted of manslaughter at the Old Bailey, had made it at least adviseable, if not necessary, that the Plaintiff should shape his declaration in case rather than that he should declare in trespass *vi et armis*.

The first case in point of time which had occurred on this point, wherein the distinction appears to have been first taken between trespass

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and case, establishing a criterion for judging in what circumstances the one or the other form of action was proper or not, they observed was *Day v. Edwards* (a), and that was a case supposed to favour the objection taken to this declaration; but that case, they submitted, was distinguishable from this, because the declaration, though in case, alleged on the face of it what would necessarily amount to a mere trespass. It charged that the Defendant furiously drove his own cart, and struck the Plaintiff's with force and violence, and therefore it was that on the demurrer in that case judgment was given for the Plaintiff on the ground that the action ought to have been trespass *vi et armis*, and not trespass on the case; but in this declaration judgment was given for the Defendant, there was no such word to be found as furiously.

The next case, on the authority of which (it was anticipated) the Defendant would attempt to support his propositions, where it was held that trespass and not case was the proper form of action to support the rule, was *Leame v. Bray* (b). That case also, they submitted, was distinguishable from the present, because there also the declaration charged that the Defendant with *force and arms* occasioned the injury by driving with *force and violence*; but in this declaration neither force nor violence was alleged to have been used on the part of the Defendant, and are only stated in averring the consequences. They also submitted that

(a) 5 Term Rep. 648.

(b) 3 East's Re p. 593.

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the authority of that case had been shaken by later decisions, wherein disapprobation of the law of that determination had been expressed by the Courts, and it had been said to be a decision that ought to be reconsidered. In *Rogers v. Imbleton (a)*, a case wherein it was held on demurrer that a declaration charging the Defendant with driving his cart against the Plaintiff's horse with force and violence, through the mere negligence, inattention, and want of proper care of the Defendant, was good as a declaration in case, and that it need not have been trespass, Sir JAMES MANSFIELD says it is not to be considered that the case of *Leame v. Bray* is overturned by the present. At the same time I may say thus much, that upon a proper case it may be fit that the decision of the Court of King's Bench in *Leame v. Bray* should be reconsidered.

So in *Huggett v. Montgomery (b)*, also, where, although the Court decided that an injury done to the Plaintiff's ship by the Defendant driving the vessel which he commanded against her, whereby he sunk her, was not the subject-matter of trespass, and that the Plaintiff ought to have brought an action on the case, the pilot having given the order whilst the Defendant was on board; yet they intimated some doubts as to the authority of the case of *Leame v. Bray*. In the case of *Leame*

(a) 2 New Rep. 117.—The declaration in that case was stated to have been intended to be adapted to either form of action.

(b) 2 New Rep. 446.

v. *Bray*,

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v. *Bray*, besides, they urged that the objection was not that trespass *vi et armis* ought to have been brought, and not an action on the case; but that it should have been an action on the case, and not trespass *vi et armis*. That decision, therefore, they insisted, could have no application to a state of circumstances where it was contended that the action should have been trespass and not case; because case may be maintained where trespass cannot; but the converse of that proposition is not correct, for where trespass *vi et armis* may be supported, the action on the case may in most instances be sustained, waving the trespass. They also cited the authorities of *Morley v. Gaisford* (a), *Brucker v. Fromont* (b), *Ogle v. Barnes* (c), and *Hall v. Pickard* (d):—distinguishing that of *Savignac v. Roome* (e).

Adolphus, in support of the rule, relied upon the authority of the cases of *Day v. Edwards*, and particularly that of *Leame v. Bray*, distinguishing this from the cases which had been cited in support of the argument in opposition to the present rule, in that the injuries in those were for the most part consequential and not immediate, either in respect of the force and violence which had produced the mischief, or of the means by which, and of the persons by or against whom the injury had been committed.

(a) 2 H. Bl. 442.

(b) 6 Term Rep. 659.

(c) 8 Term Rep. 188.

(d) 3 Campb. N. P. C. 187.

(e) 6 Term Rep. 125.

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In the present instance, it was urged, the injury done affecting the person of the Plaintiffs immediately, and not the property of the party, the question which must determine this case would be merely whether the result which was the cause of this action was the *immediate* consequence of force originally applied by the Defendant or not; and if that were so, the action must necessarily be trespass, and cannot be case. That, it was urged, had been determined to be the true and only distinction in all the cases.—*Savignac v. Roome* (a), *McManus v. Crickett* (b), *Covell v. Laming* (c), *Hopper and Wife v. Reeve* (d).

In this case, he urged, the evidence proved throughout the wilful and wanton force, and fury, and violence of the Defendant: the cause of the injury was excessive violence, and the effect of that violence was immediate, sudden, and direct. There was nothing of carelessness or negligence in evidence, except in as far as the Defendant was proved to have been in his fury careless of the lives of passengers and even of his own; but it was not the carelessness of mere inattention. There was no want of skill or judgment in driving proved on the part of the Defendant, nor was his conduct attributable to ignorance. It amounted to an actual breach of the peace, if indeed the degree of violence could make any difference, which it does not, further than to shew more clearly that the act was *vi et armis*.


(a) 6 Term Rep. 125.

(b) 1 East's Rep. 106.

(c) 1 Campb. N. P. C. 497.

(d) 7 Taunt. 698.

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Upon the broad principle of distinction, therefore, that the injury complained of was the immediate consequence of the Defendant's forcible act, it was insisted, that the present action had been misconceived, and the verdict could not be supported.

Cur. adv. vult.

The Court this day gave judgment.

The *Lord Chief Baron* was absent from indisposition.

GARROW, *Baron*. I have the satisfaction of being able to say, in the absence of my *Lord Chief Baron*, that he concurs with me in the opinion which I am about to deliver in this case, although I regret that we have not also the concurrence of my learned Brother who is present.

[His Lordship stated the declaration, and the circumstances in evidence.]

No question has been made of the propriety of this verdict on the ground of the amount of damages. The simple point is, whether the action which is case in form, should not have been (and that necessarily) trespass? The matter has been very ably argued on both sides, and on all the cases at all bearing on the point which have been brought before us. The difficulties have arisen from there being some discrepancy in many of those. I shall
 not

not now risk an examination of the principles upon which they have been determined. It will be sufficient to say, that it is the opinion of my *Lord Chief Baron* and myself, after the best consideration that we have been able to give to the question, that in *this case*, under all the circumstances, the present action is well maintainable in case:—consequently this rule must be discharged.

GRAHAM, *Baron*.—Under all the circumstances of this case, I do not regret that my opinion will be of no avail, and that it will have no effect upon the verdict which has been obtained in this action. A reluctance, however, to give up what I have always considered to be established principles of pleading, compels me to dissent from the rest of the Court on this point. I well remember, that in the time of Lord *Kenyon* the well known distinction in all these cases was where the injury complained of was direct and immediate, and where it was merely consequential. That was settled, and is well illustrated by a very old case where a log of wood having been thrown, it was held that it was a trespass against the party struck by the throwing of the log, and that trespass in that case would be the proper form of action: but that in the case of a subsequent injury to another person sustained by an accident arising from the log remaining in the road, it was no longer trespass, and his remedy would be by action on the case, and that because in the second instance the injury was merely consequential. The facts of every case of this sort are the best guide for determining the question of pleading.

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pleading. It is admitted that trespass would lie in this case, and if the mode of redress, and the form of action be matter of option, it appears to me that there is an end of all distinction in such cases, and that to insist on it would be futile and nugatory. It has been said that these nice distinctions of the old cases ought not to be preserved; yet the earlier books are full of them,—and I, for one, cannot consent to give them up, because I am fully convinced of their utility. It is also said that the trespass may be waved; but if you wave the trespass in such cases, in my opinion you wave every thing which entitles you to seek redress in a court of law, and there is no longer any foundation for your action.

Now let us look at the circumstances of this case [His Lordship stated the material facts.] A case of more direct and immediate injury, and of force and violence than this I confess I am at a loss to conceive. It is not only a case of gross and violent private injury, but a positive misdemeanour. This is nothing like the case of an obstruction by setting up a post or rail in the road, in consequence of which some person meets with an accident from which he receives a hurt. That I say would have been good ground for an action on the case, and that action must have been framed in case. But here the Defendant is driving furiously along the public road like a madman, to the imminent danger of every one passing; and it is in proof that he was quite drunk at the time. The only circumstance in his favour is, that he pulled up his horse as soon as the accident happened. He had
however

however given the *impetus* and *momentum* to the horse and carriage, which was the immediate cause of a direct injury, nothing less than the killing a man and knocking down the woman. Now what was the *intermediate* act in this case? It appears to me that nothing could be more direct and immediate. The difficulty of drawing any better line in these cases, and the danger of destroying so useful a distinction as that which has been so well established, and has ever been recognized,—giving a choice of remedies where the law has assigned different forms of action to the different causes of complaint,—will not allow me to concur with the rest of the Court in the view which has been taken of the point raised by this rule.

Rule discharged.

BAGNALL v. UNDERWOOD.

THE Plaintiff in this cause, which was an action

prove the truth of averments, in a declaration in an action for libel, according with statements in the publication.

In an action for a libel on the Plaintiff, who alleged in his declaration that he *held an office of trust and confidence, to wit, the office of overseer of a common field*, and that the Defendant composed, &c. of and concerning the Plaintiff, *and of and concerning his conduct in his said office of, &c.* a libel, part of which was that the committee (for managing the concerns of the said field) think proper to satisfy the inhabitants, &c. respecting the different charges laid against the Plaintiff the late overseer, &c. *for embezzlement, or not giving a proper account of the public property*; the Plaintiff put in the libel, and proved publication, &c., and that he was overseer. It appeared from the testimony of his own witnesses that he was not intrusted by the committee, as such overseer, with the receipt of money, or that any particular confidence was necessarily reposed in him in virtue of his employment, which appeared to be a somewhat humble one. It was objected that he should have proved that it was an office of trust and confidence as alleged, and that therefore the action could not be supported: Held, that as the libel in its terms imported that it was an office of trust and confidence, and charged a fraudulent abuse of it, it was therefore not necessary to give any proof of it in support of the allegation in the declaration.

A nonsuit, which had been directed on the ground of that averment requiring proof, set aside, and a new trial granted.

Evidence given, tending to shew that the situation was not one of trust and confidence, does not furnish ground for directing a nonsuit.

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It is not necessary to give evidence to

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for a libel, tried before *Mr. Baron Garret*, at the assizes at *Stafford*, was nonsuited by the learned judge, on the ground that the office held by the Plaintiff, and in respect of his conduct, in which the declaration stated that the Defendant had published the libel complained of, was not shown to be one of trust and confidence, as it was alleged to be in the declaration; but was proved not to be so, and therefore the action could not be maintained for want of evidence of a material allegation.

The first count of the declaration after the usual introductory averment, by way of inducement of the Plaintiff's theretofore good repute, &c. stated, that before, &c. the Plaintiff had been duly appointed to fill and hold, and had filled and held *a certain office and place of trust and confidence*, to wit, *the office of overseer of a certain common field*, situate, &c., and then (stating that he had always conducted himself properly therein) charged and set forth the libel. It alleged that the Defendant composed, printed and published it, and caused, &c. of and concerning the said Plaintiff, *and of and concerning his conduct in his said office of overseer as aforesaid*. The libel, as afterwards set out, appeared to be a printed handbill, signed by the Defendant, and addressed to the inhabitants of *Stafford*, and it stated (with *intendoes*) that at an adjourned meeting of the committee of the common field, it was ordered that the committee think proper to satisfy the inhabitants of the town respecting the different charges

charges laid against (the Plaintiff) the late overseer of the common field for embezzlement, or not giving a proper account of the public property. It then enumerated various specific instances of the Plaintiff having received money from several persons in respect of the field, for which he had not accounted, and concluded by observing that "the public will now consider how far the late overseer of the common was a proper person for the situation." There were five other counts in the declaration, all stating the libel to be of and concerning the Plaintiff's conduct *as such overseer*.

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The defendant pleaded the general issue and other pleas, by way of justification, alleging the facts as set out in the declaration *in the terms of the libel*. The Plaintiff took issue on the pleas.

Jervis had obtained a rule to shew cause why the nonsuit should not be set aside, and a new trial granted on the following grounds: 1st, because it was not necessary, in this case, to support by positive proof the allegation in the declaration, that the office was an office of trust and confidence, it being mere matter of inducement: and the libel itself so stating it, had rendered that proof unnecessary, on the authority of the case of *Berryman v. Wise (a)*; and 2dly, that if other proof were necessary, the allegation had, in point

(a) 4 T. R. 366.

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of fact, been substantially proved at the trial, by the evidence of the witnesses called in support of the Plaintiff's case, who stated that the Plaintiff acted in the character which he had in his declaration described himself as holding.

GARROW, *Baron*, now read his report of the evidence given at the trial, from which it appeared to have been proved that the duty of the Plaintiff as overseer of the common field was merely to *look after the cattle there*, and that it was *no part of his business, as such overseer, to receive the money paid* in consideration of the feeding, &c. of the cattle depastured thereon, but that, on the contrary, it ought to have been received by another person (one of the witnesses), who was called the treasurer. He, however, sometimes requested the Plaintiff to receive it for him, because it was more convenient, as he lived on the common; but he did not receive it on any occasion *in his capacity of overseer*, and the Plaintiff was not accountable to any other person for what he so received. His Lordship therefore reported himself to have ruled that the averment was not sufficiently proved to sustain the allegation, and that that was the ground of the nonsuit which he had directed.

Taunton, Campbell, and Russell shewed cause. They insisted that the introductory allegation in the declaration was in all cases of this description of the essence of the charge, and material to be proved; for by the proof of that it is that both the
Plaintiff's

Plaintiff's right to damages and the measure of the amount can alone be ascertained. So far, however, from its being proved in this case by the evidence, that the place or office respecting the Plaintiff's conduct in which the libel is charged to have been published was one of trust or confidence, it is in fact negatived distinctly by the Plaintiff's own witnesses. It need not certainly (they admitted) have been stated in the declaration that this was a place of trust and confidence, at least, in order to found the action, for if it had been stated as the fact really was, the Plaintiff might still have recovered. The object of so setting it forth therefore, they urged, could only be to enhance the damages by misleading the jury, and if in so doing the Plaintiff had overstated it, he must submit to the consequence of his own wilful misrepresentation. In *Bell and others v. Janson (a)*, it was determined that as an unnecessary averment might be material, if a Plaintiff take upon himself to allege that he is of a particular description of persons, he is limited to that particular description of himself, and is consequently bound to prove it correct. They submitted that the rule was, that if the libel, which is the subject-matter of the action, furnish an admission of the fact on which the Plaintiff's right to sue for an injury offered him in a particular character is founded, it is only *prima facie* evidence, as was held in *Smith v. Taylor (b)*. Here the particular character in which the Plaintiff states himself to have

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(a) 1 Maule and Selw. 201.

(b) 1 New Rep. 208.

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been, and in respect of which the injury complained of by the libel affects his interest, is a very material part of the gravamen of the charge, on proof of which his right to damages mainly depends. That part of his case is however expressly denied and disproved, and no room is left for supplying it by presumption. The character in which the Plaintiff sues is always made the introductory part of the charge, and stated, as in this case, by way of inducement; and it should be the first evidence offered on the trial, because it is most material to be both alleged and proved. Having been alleged and not proved in the present case, they insisted therefore the Plaintiff was properly nonsuited.

They distinguished this case from that of *Berryman v. Wise*. In that case, the question was not whether it was necessary for the purpose of maintaining the action for the Plaintiff to prove that he was an attorney, but whether, having undertaken to prove it, he had adopted the right mode, or whether it was not necessary that he should prove it by his admission, or by a copy of the roll; but whether it was necessary to prove it at all did not come in question. The report of the case is so short that it does not give any precise information of the real point before the Court, and it is difficult to collect the ground of the decision, which is made the more obscure by the little which *Mr. Justice BULLER* is represented to have added when the determination was pronounced. It is clear, however, that in that case the averment was in some sort proved. Besides,
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it may be competent to the Court to take notice of an attorney as being a well-known officer. Not so the overseer of a common field. If in that case, however, the Plaintiff had proved himself a conveyancer in support of the allegation that he was an attorney, which would more nearly have approached the present case, he would have failed, and being a material allegation he must have been nonsuited.

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Jervis, Puller, and Pearson in support of the rule, contended that it was sufficient that the tenor of the libel *imported* that the Plaintiff acted in the character in which he stated himself to be acting, and in respect of which he had sustained the injury complained of. It also further *imported* that a trust was confided to him in that character, which he was stated in the libel to have abused, and that he must in consequence necessarily have had opportunities of committing the acts of embezzlement of which he had been therein said to have been guilty. No proof of any of those circumstances, therefore, was necessary to have been furnished by any sort of testimony being laid before the jury on the trial of the action. That is the principle of the case of *Berryman v. Wise*, and the received rule in all cases of actions for slander. In *Smith v. Taylor*, that was strongly stated by Chief Justice MANSFIELD and Mr. Justice HEATH, and not controverted by the other judges, who dissented on certain points in that case. There the Plaintiff being a physician was the gist of the action, and the allegation was not mere induce-

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ment. The vague words of the slander also were considered, by two of the learned judges, not to designate sufficiently that the Plaintiff bore the character of a *Physician*, to dispense with proof because he was spoken of as *Doctor Smith*, which was not thought sufficiently definite; but the very ground of the difference of opinion on the Bench in that case, shews that if the words had clearly been spoken of him as a physician, proof of his degree would have been unnecessary. They observed that on this record there was also a plea of justification, which repeats in terms the allegations contained in the libel, and that, they contended, still further dispensed with proof of their truth.

It was then urged, that in an action for a libel like the present, supposing that this were not a place of trust and confidence, nor afforded opportunity for embezzlement and fraud, the libel would in that case be the more malicious and aggravated, and the injury the greater and more unmerited; and as the words were actionable in themselves, that might be taken to be a matter of aggravation of the offence. All the instances of misconduct charged against the Defendant, however, expressly relate to the office which he is stated to have held. The charge, that he had not given a proper account of the public property, clearly *imported* that he was confidentially intrusted, in his particular situation, with the public property, and that he abused that trust; and that brought this case precisely within the rule of evidence in all these cases.—*Phillipps*, 227. The case

case of *Berryman v. Wise* was distinctly determined on the ground that the import of the slander is tantamount to an admission, on the part of the Defendant, that the import deducible from it is true. In actions for tort by slander, the old strictness required in proving even material allegations has been long very considerably and properly relaxed. In *Figgins v. Cogswell* (a), the Plaintiff declared, that being a carpenter and sworn appraiser, by reason of slander by the Defendant, a third person had omitted to employ him as an appraiser : having failed to prove himself an appraiser, which was held to be material, he was nonsuited, but that nonsuit was set aside. They cited also *Hall v. Smith* (b) to the same point.

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It was submitted that it was a fallacy to assume that the terms "trust and confidence" necessarily bore relation to the receipt of money, or imported that some pecuniary charge was committed to the fidelity of the person spoken of, or that he was liable to render any account to others of the produce of his employment, for that any situation or duty, unconnected with a charge of money, might be capable of being abused ; as for instance, that of committee of a lunatic. So, even of a person in the ordinary situation of a man employed to lock up a banking-house every night when business should be over, who might be said to have a place of trust and confidence, it would be libellous to say,

(a) 3 Maule and Selw. 369.

(b) 1 Maule and Selw. 287.



that, holding a place of trust and confidence, he was guilty of embezzlement of his employer's property: and it would not be necessary to shew in such a case that his was a situation of pecuniary trust. Money might come to the hands of a person holding the situation described in the libel, and in consequence of his holding that situation, although it might be no part of his duty to receive it. But it is not necessary in an action for a *tort*, that a Plaintiff should prove all the several parts of his allegations. It is sufficient if they be proved in substance.

They insisted, that the mode and terms of the allegation of the particular character said to be sustained by the Plaintiff in the action, could not have been asserted for the purpose of misrepresentation and enhancing damages, or that, if it were, it might be contradicted by evidence negating the fact in diminution of the damages, shewing that the Plaintiff's situation was not, as stated in the declaration, a place of trust and confidence.

They therefore insisted that this nonsuit could not be sustained.

RICHARDS, Lord Chief Baron. We are of opinion (the Court having conferred together for some time) that there ought to be a new trial in this case. There can be no doubt that it is plainly to be inferred from the general tenor of the paper which contains the libel on this occasion,

sion, that it was the object of the party by whom it was put forth, to represent the person who was the subject of it as holding a situation of trust and confidence, and that he had abused it. We think that quite sufficient to sustain the allegation in the Plaintiff's declaration, and that therefore it was unnecessary to require proof that the nature of the situation which he held, or to shew by evidence that it was an office of trust and confidence.

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GRAHAM, *Baron*. I am of the same opinion. I do not see the necessity for any proof of the allegation which, it is contended, ought to have been proved on the trial; nor do I perceive that there is any such discrepancy between the allegation and the evidence as has been stated. It appears that although the Plaintiff was not entrusted with money *virtute officii*, he was frequently so entrusted *occasione officii*. At all events, the ground stated by my *Lord Chief Baron* is quite sufficient to satisfy me that this nonsuit ought to be set aside, to give the Plaintiff an opportunity of submitting the subject-matter of his action to a jury.

WOOD, *Baron*. I concur in thinking that this nonsuit must be set aside. I was myself of counsel in the case of *Berryman v. Wise*, and I well recollect the ground of the determination, and can supply the alleged deficiency of the report. It was there distinctly held by the Court, that statements in a libel rendered it unnecessary to give evidence of the truth of averments in the Plaintiff's declaration



declaration corresponding with those statements: and that they have the effect of dispensing with formal proof.

Wood, B.

If, as the Defendant's counsel have urged, the averment of the nature of the situation was introduced into the declaration to enhance the damages, it may also be said that the expressions in the libel, from which it is to be inferred that the abuse of the duties of the situation held by the Plaintiff, was an abuse of duties belonging to a place of trust and confidence, were a considerable aggravation of the slander; and it would be singular if we were to hold that evidence of the aggravated statements of a libel having no foundation in fact, may be used in diminution of damages.

I am clearly of opinion, on the principle of the case of *Berryman v. Wise*, which I think is founded on good sense, that this nonsuit ought to be set aside.

GARROW, *Baron*, submitted to the opinion of the rest of the Court, who therefore made the

Rule absolute.

RICHARDSON V. HODGSON.

TINDAL obtained a rule to shew cause why the bail-bond assigned in this action and the proceedings had thereon, should not be set aside, with costs, for irregularity, on the following facts:

The Defendant was served with a *quo minus*, returnable on the 15th of June; and notice of bail being put in, was served on the 21st of June. The Defendant's clerk in court delivered a bail-piece to the clerk in court for the Plaintiff, on the 11th of July, with notice of justification for the first day of the following Michaelmas Term. The Plaintiff's clerk in court having excepted to the bail, on the 6th of November; time was given till the 15th of November, to furnish a fuller description of the bail, and the order duly served. On the 14th of November the Defendant rendered in discharge of his bail, and was thereupon committed, notice of which was served on the same day. After the surrender, process on the assignment of the bail-bond was issued against the bail, returnable on the 23d of January.

Parke now shewed cause, on an affidavit stating that the Defendant having been arrested in this action on a writ returnable the 15th of June, a declaration was filed *de bene esse*—that special bail was filed within the time for putting in bail—that (the bail not being considered on inquiry satisfactory) the Plaintiff's attorney excepted to them, which he would not have done if they had

1823.
12th February.

Whereas Plaintiff had proceeded on an assignment of a bail-bond taken after the render of the Defendant, who had put in bail, whom he had insufficiently described, so that time was necessarily given for furnishing a better description, during which interval such further description was not given, nor was any attempt afterwards made to justify—the Court set aside the proceedings on the assignment of the bond.

It is not necessary in this Court to produce an affidavit in support of such an application, that it is made *bond fide* and on behalf of the bail; there being no rule in this Court requiring such an affidavit to be made.

Costs ordered to abide the event as costs in the cause.

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had been sufficient, but would have demanded a plea, as he might have done, when he would have been in time to have tried the cause at the ensuing assizes for *Lancaster*—that he had not so demanded a plea, because it would have been a waiver of his right to except to the bail—that the justification of bail was ordered to stand over till the 15th of November, that the Defendant might, in the mean time, supply a fuller description of the bail, (the Court reserving the question of costs till the bail should justify,)—and that no better description of the persons offered by bail was ever given, nor was any justification afterwards attempted.

It was insisted that as the object of the present rule was, that the bail-bond and the proceedings thereon should be peremptorily set aside for irregularity, with costs, it could not be made absolute—that although the bail-bond had been assigned, and proceedings taken on it after the render of the Defendant, it was not competent to the bail to move to set aside the proceedings for irregularity, on the mere ground of the render of the Defendant before the assignment of the bail-bond, under the circumstances of this case. It was urged, that the render in this instance was insufficient for the purpose of discharging the bail; and it had been recently decided that an insufficient render would not operate to prevent an assignment of the bail-bond being taken and proceeded on. In *Brown v. Jennings* (a), the Court

(a) 2 Barn. and Ald. 768.

of King's Bench held, that where a Defendant had been rendered before the assignment of the bail-bond, it might, under circumstances, be an insufficient render, for the purpose of protecting the sheriff and the bail. In this case the objections to the sufficiency of the render were, that the Plaintiff had lost a trial by the delay occasioned by the putting in unsatisfactory and exceptionable bail: and their residence and condition having been insufficiently described, created a further delay to the prejudice of the Plaintiff. It was now attempted to take advantage of that very circumstance to set aside the proceedings occasioned by it, and that not by way of favour and indulgence and on terms, but peremptorily and with costs.

It was also objected that there was no affidavit made in this case on the part of the bail, that the application was *bond fide* and on their behalf, which was the more necessary in this case, as the pretended bail might be mere names of persons not in existence.

D. F. Jones, in support of the rule, contended that the render was sufficient and in time—that it was not necessary the bail should justify to enable them to render their principal, but that they may surrender the Defendant after the sheriff has been ruled to bring in the body, or *after* an assignment of the bail-bond.—*Tidd's Practice*, (7th edit.) 207. R. T. 33 Geo. 3. 5 T. R. 368. 2 Bl. Rep. 758. 1179-80. So bail who have been rejected may

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may surrender, so long as their names are on the bail-piece (a), and the tender of a Defendant is equivalent in all respects and for all purposes to a justification and perfecting of bail. *Hurford v. Harris* (b), *Chadwick v. Battye* (c).

It was further insisted that the proposition of a trial having been lost, had not been distinctly sworn to, nor sufficiently made out, nor had it been stated in the affidavit when the declaration had been filed. 1 *Chitty's Rep.* 270. 357. 271. On that point, therefore, it was contended the answer to the application had wholly failed.

As to the want of an affidavit on the part of the bail that the application was *bond fide* and made on their behalf, it was met by a statement that it was not necessary in practice in this Court to make any such affidavit, *Searle, Assignee, &c. v. Hale* (d).

On the whole, it was insisted that as there was nothing in this case which operated to deprive the parties of their right to take advantage of the usual alternative, the rule, upon the facts stated on either side, ought to be made absolute.

Per Curiam. Under all the circumstances of this case, we are of opinion that the tender in this case was sufficient, and that the proceedings on

(a) 1 *Chitty's Rep.* 446.

(b) 4 *Taunt.* 669.

(c) 3 *Macle and Selw.* 283.

(d) *Ante*, Vol. III. p. 52.

the assignment of the bail-bond must be set aside. In the case of *Brown v. Jennings* in the *King's Bench*, there were very particular circumstances. One of those was, that one of the bail had been convicted of perjury, but even there the Court expressly and cautiously guard against giving any opinion on the general question, whether an assignment is good after a render or justification, even subsequent to the expiration of the time allowed. We will therefore so far make this

Rule absolute.

As to the question of costs, we think that we cannot give costs in this case to the party making the application, under all the circumstances. The costs therefore must abide the event, and be considered as costs in the cause.

In Re the Manucaptors of CARTMAN,
in the case of

The KING v. CARTMAN.

(On a forfeited Recognizance.)

SIR *W. Owen* moved the discharge of the estreat of the recognizance which had been forfeited in this case by the applicant, who had become bound as one of the pledges for the appearance at the quarter sessions of a person charged

with the commission of that statute with reference to its object, and the nature of the particular case, and the circumstances of the applicant, and what he had already endured in consequence of the forfeiture of his recognizance.—*Vide PRICE's "TREATISE ON THE COURT OF EXCHEQUER."* Vol. I. B. I. Ch. xiii.

1833.

Friday,
31st January.

Estreat of forfeited recognizance discharged on petition under the 4 Geo. 3. ch. 10.

Operation and construction

with

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with an offence against the game laws, and that the party might be released from prison.

The application was founded on the usual documents, as the *constat*, petition, certificate and affidavit verifying the statements in the petition.

The petition stated that the applicant had become bound for the appearance of the principal, &c.; that he afterwards absconded, and that the petitioner was unable to produce him according to the condition of his recognizance, and that he had ever since been unable to find him, or discover where he had gone, although he had made continual and diligent inquiry and search. It also stated that the petitioner's goods had been seized by the sheriff under the process of this Court, and that he himself had been taken and lodged in prison, and had been confined in *York Castle* ever since the 15th of the month of October last; and that the petitioner was not worth five pounds, and had a wife and six children under ten years of age receiving parish relief. It concluded with a denial of collusion and the negative averments calculated to satisfy the last clause of the act.

The motion was made under the statute of the 4th of Geo. 3. ch. 10 (a).

The

(a) That statute recites, that many recognizances have been extorted against persons for not appearing as parties or witnesses in the Courts of Record at *Westminster*, or at the assizes and general

The Court were at first strongly disposed to refuse the application, when they were informed on inquiry that the offence with which the principal had been charged was breaking into a wood, armed with a gun; because, as they declared, the charge was one of so serious a nature as to make it necessary to visit the party who had been the occasion of enabling the offender to evade justice with severe punishment, for the sake of example. At all events, such a person was not entitled to the favour of the Court; and as these applications were altogether matter of grace, they said this was certainly not a case for the exercise of clemency.

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The Counsel for the petitioner then more par-

neral quarter sessions, or other courts of record, or for not prosecuting indictments there, or otherwise not performing the conditions in such recognizances contained, many of which *neglects of duty* have happened by the inattention of ignorant people, some of whom are imprisoned, and a great number of others liable to be so by the process constantly issued against them out of the Court of Exchequer, and directed to the sheriffs, though no other prosecution be subsisting, but merely for such forfeitures of their recognizances, from which there are no *easy* means at present, for poor persons especially, to procure their discharge. For remedy thereof, it is enacted, that it shall be lawful for the Barons of the Exchequer, upon affidavit and petition to be presented to them by or on behalf of the persons imprisoned, or liable to be imprisoned on the forfeiture of any such recognizances, to discharge such persons by order from the barons, *without any quietus* to be sued out for that purpose.

The act concludes with excepting out of its provisions all such petitions in respect of *other* debts due to the Crown, and cases of fraud on the revenue by contraband trade, and assaulting officers of the Customs or Excise in the execution of their duty.

ticularly

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 v.
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ticularly and minutely directed the attention of the Court to the words of the statute, which, he submitted, assumes, that the poor and ignorant persons, for whose relief the act had been passed, had been guilty of neglect of duty, and it expressly provides for such cases. He urged that there were certain exceptions in the act which excluded all others, and he pressed on the Court that the result of refusing to relieve the petitioner, would be, that he must endure imprisonment for life, which was contrary to the spirit of the law and the constitution of *England*.

In conclusion, he directed the notice of the Court to the writ of Privy Seal dormant, which is issued at the commencement of every reign, for the purpose of giving the *Court of Exchequer* general and unlimited authority to discharge or mitigate and compound such matters as the subject of the present motion; and he finally urged that his own personal experience in the practice of this Court enabled him to state, that this power had been always exercised with very great latitude, the Court having heretofore always inclined to the merciful consideration of cases of this nature.

RICHARDS, *Lord Chief Baron*,—having shortly deliberated with the rest of the Court—I am myself obliged to the learned Counsel for having in this case called our attention to the Act of Parliament on which our enlarged authority, in matters of this nature, appears to be founded. I certainly

was not aware of the precise terms of that statute, but I am now, after having attentively examined them, strongly impressed with the propriety of this application, although I confess I was at first by no means disposed to grant it. Upon reference to the act of the 4th of the King, however, (a statute which appears not to have been brought so frequently, or at least so particularly, under the consideration of the Court as to make us familiar with its object,) I am become wholly of a different opinion. Until this day, I had considered that applications of this nature were founded on the discretionary authority given to the Court under the 33d of Hen. 8. ch. 39. (a). The 4th of Geo. 3, certainly goes much further, and, in my view of it, requires us to interfere in this manner (b).

Then, if we look to the circumstances of this case, we shall find that the petitioner has strong claims upon the Court in calling for its interference in his discharge. It is true, the charge against the person for whose appearance to answer it he had become bound, was serious, and his having absconded may be a circumstance from which it may be inferred that there was but little doubt of his guilt. The petitioner however has suffered a seizure of his goods, and has been confined in gaol ever since October last—that is I think a punishment sufficient to operate as a lesson for the future, and to have been adequate to his in-

(a) Vide Gilb. Treat. on the Court of Exchequer, p. 191.

(b) Vide Rex v. Dibbens, Parker's Reports, p. 166.

strumentality

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strumentality in screening the principal from justice. Then the poor man has a wife and six children. I have not the least hesitation in saying that I think we ought to grant the prayer of this petition.

The rest of the Court concurred.

Ordered*.

* This case is the more particularly worthy of notice, as, in the words of the *Lord Chief Baron*, "the statute upon which the application was founded has not been frequently, or at least particularly brought under the consideration of the Court."

The whole business of the Barons, in discharging, in a summary way, on petition and affidavit under the 4th of Geo. 3., or by motion, or otherwise under the writ of Privy Seal dormant, being proceeded upon and transacted in the once important Office of Lord Treasurer's Remembrancer—an Office, forming part of the establishment of the *Exchequer*, of late years much withdrawn from the public attention—is therefore not very fully or generally understood; and its utility and importance are consequently only proportionally appreciated.

The subject of that Office generally, and the business of these discharges are very amply treated of and explained in "A TREATISE ON THE COURT OF EXCHEQUER" recently published by the author of these Reports. The particular topic of discharging, mitigating and compounding charges of this description, forms the subject of an entire chapter—the 13th of Book I.—of that Work.

[IN THE HOUSE OF LORDS.]

Between CHARLES WALL and others, [Assignees
of BOND and others, (bankrupts)]

Appellants,

and

The ATTORNEY-GENERAL,

Respondent.

1823.

March
4th and 8th.

Jurisdiction
(appellate) of
the House of
Lords.

An order
made by the

[Appeal from an ORDER of the COURT of EXCHEQUER.]

THIS was an appeal against certain parts of an
order (a) made by the *Court of Exchequer* on the
22d day of *December*, 1815, in the *ten several*

Court of Exchequer, consequent upon a judgment of the Barons, in the *matter of an extent* upon facts reported by the Deputy Remembrancer to the Court, on a reference to him, is not the subject-matter of an appeal to the *House of Lords*; because (*semble*) it is a proceeding at law and not in equity, and the House has no appellate jurisdiction in such cases, as they have in many of those substantive independent decretal orders which are from time to time pronounced by courts of equity.

The proceeding by writ of extent, and all proceedings thereon, interlocutory and final, (*semble*) are proceedings at law.

The 25 Geo. 3. ch. 35. does not make the order of the Court to sell the real property of a Crown debtor an equitable proceeding, so as to subject it to the immediate appellate jurisdiction of the *House of Lords*.

To found an appeal to the *House of Lords*, the party failing must put his defence upon the record so as to obtain the judgment of the Court at Law, upon which he may bring a writ of error, and he may then appeal from the judgment of the Court of Error to the *House of Lords*: or he should file an English bill (or bill in equity in the *Exchequer*) to establish his right against the crown, when, if he do not obtain a decree in his favour, he may at once present a petition of appeal from the Court of Equity to the House.

Semble, that a party entitled to proceed by motion made to a Court of Equity under the various statutes authorizing such summary applications, is not thereby precluded from filing a bill in equity to obtain the same object, if with a view to saving his right of appeal, or for other reasons, it should be considered the more advisable course.

Quære. Whether, when a debt, originally on simple contract, recovered by crown process, and brought into Court as part of the general fund which was the produce of sale of the lands of the crown-debtor, sold on motion under the 25th Geo. 3. ch. 35. can be considered to be proper money of the crown, and to have been legally or equitably appropriated to the crown on and from the confirmation of the Master's report, finding the crown intitled to a certain proportion of the fund from that time, in consideration of the debt due, and whether the crown is entitled to the accumulation of the dividends, &c. on the amount from the same time?

See OBSERVATIONS on this Case, and reference to authorities, at the conclusion.

(a) Vide *ante*, Vol. II. p. 67.

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causes mentioned in the note below (a), out of certain writs of extent issued against the estates and

(a) The following were the true titles of the various causes in which the several orders of the Court were, from time to time, expressly made:—

“ Between our Sovereign Lord the KING and WILLIAM MAINWARING, THOMAS REID, and GEORGE WARD, assignees of WALTER BOYD the elder, PAUL BENFIELD, and JAMES DRUMMOND, claiming the property of certain lands, tenements, and hereditaments, seized into his Majesty’s hands on two writs of extent, issued at the instance of the *Treasury* and *Admiralty*, against the said Walter Boyd the elder, Paul Benfield, Walter Boyd the younger, and James Drummond, directed to the sheriff of the county of *Dorset*, *Defendants*.”

“ Between our Sovereign Lord the KING and ABRAHAM ROBARTS, claiming the property of the lands, tenements, and hereditaments seized into his Majesty’s hands on the writs of extent above-mentioned, *Defendant*.”

“ Between our Sovereign Lord the KING and WALTER BOYD the elder, PAUL BENFIELD, WALTER BOYD the younger, and JAMES DRUMMOND, on a writ of immediate extent, issued at the instance of the *Treasury* into the county of *Herts*, *Defendants*.”

“ Between our Sovereign Lord the KING and DAME JOANNA RUMBOLD, widow, EWAN LAW, Esq. WILLIAM SHEEPHANKS, clerk, and EDWARD LAW, Esq. executors and trustees named in the will of Sir THOMAS RUMBOLD, Bart. deceased, claiming the property of certain lands and hereditaments seized into his Majesty’s hands on the writ of immediate extent last above-mentioned, *Defendants*.”

“ Between our Sovereign Lord the KING and WILLIAM MAINWARING, THOMAS REID, and GEORGE WARD, assignees of the above-named Walter Boyd the elder, Paul Benfield, and James Drummond, claiming also the property of certain lands and hereditaments seized into his Majesty’s hands on the writ of immediate extent last above-mentioned, *Defendants*.”

“ Between our Sovereign Lord the KING and CHARLES WALL and JONATHAN HOARE, claiming also the property of certain lands

and effects of *Walter Boyd* the elder, *Paul Benfield*, *Walter Boyd* the younger, and *James Drummond*, who had become bankrupts.

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The order itself was the ultimate result of the following facts and previous proceedings.

On the 7th of *February*, 1798, the parties

lands and hereditaments seized into his Majesty's hands on the writ of immediate extent last above-mentioned, *Defendants*."

" Between our Sovereign Lord the KING and WALTER BOYD the elder, PAUL BENFIELD, WALTER BOYD the younger, and JAMES DRUMMOND, on a writ of immediate extent, issued at the instance of the *Admiralty* into the county of *Herts*, *Defendants*."

" Between our Sovereign Lord the KING and the above-named DAME JOANNA RUMBOLD, widow, EWAN LAW, Esq. WILLIAM SHEEPSHANKS, clerk, and EDWARD LAW, Esq., executors and trustees named in the will of Sir THOMAS RUMBOLD, Bart., deceased, claiming the property of certain lands and hereditaments seized into his Majesty's hands on the writ of immediate extent last above-mentioned, *Defendants*."

" Between our Sovereign Lord the KING and the above-named WILLIAM MAINWARING, THOMAS REID, and GEORGE WARD, assignees of the above-named Walter Boyd the elder, Paul Benfield, and James Drummond, and claiming also the property of certain lands and hereditaments seized into his Majesty's hands on the writ of immediate extent last above-mentioned, *Defendants*."

" Between our Sovereign Lord the KING and the above-named CHARLES WALL and JONATHAN HOARE, claiming also the property of certain lands and hereditaments seized into his Majesty's hands on the writ of immediate extent last above-mentioned, *Defendants*."

The above titles were considered very material in this case, as will be seen. In point of form, the *Lord Chancellor* observed "it would have been an insuperable objection to the appeal, that the order was entitled as in a cause, whereas it was in *ten causes*."

x x 2

against

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against whom the extents had issued were indebted to the Crown in the sum of 50,000*l.* for money advanced to them for the supply of the Navy, which sum was secured by the joint and several *bond* of the Bankrupts, dated on that day.

On the 12th day of *March*, 1799, the Bankrupts became further indebted to his Majesty in the sum of 100,000*l.*, being so much of his Majesty's money paid to them by the style and firm of *Boyd, Benfield* and Company, by a *draft* by the Commissioners of the *Treasury*, and dated the 9th of *June*, 1798, in pursuance of the *King's warrant*, dated 4th *December*, 1797, and furnished for the supply of his Majesty's forces, serving at the *Cape of Good Hope*, no part thereof having been applied by the said *Boyd, Benfield* and Company, for the supply of his Majesty's forces, or otherwise for his Majesty's use. A commission was therefore issued out of this Court *at the instance of the Lords Commissioners of his Majesty's Treasury*, to find the said debt, and by an inquiry taken on the 12th day of the same month of *March*, the whole of the said debt was found to be due to his Majesty, in respect of the money issued to them under the said *warrant and draft*.

On the 19th of *March*, 1800, two several writs of extent were issued on the part of the Commissioners of his Majesty's *Treasury* against the Bankrupts, *Boyd* and Company, both tested the same day, the one directed to the Sheriff of the county of *Herts*, and the other to the Sheriff of the

the

the county of *Dorset*, and on the same day two similar writs were issued against them on the part of the Commissioners of his Majesty's Navy, in respect of the debt due to his Majesty on the said joint and several bond. By inquisitions taken on these several extents, 23d *January*, 1801, *Paul Benfield* was found to be seized of certain lands, tenements, &c. and also to be possessed of certain leasehold estates in the said respective counties, and of goods and chattels, all which lands, &c. the said sheriffs seized into his Majesty's hands.

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Similar extents were issued both by the *Treasury* and the *Navy Board* into the city of *London*. On that issued at the instance of the *Treasury* certain effects were seized, and the produce paid in part discharge of the *Treasury* debt.

On the 25th of *March*, 1800, *Boyd* and Company were declared bankrupts, and the Appellants were chosen their assignees.

The several estates seized under the extents were afterwards sold by virtue of orders of the *Court of Exchequer*, and the purchase-money paid into that Court, and after payment to the executors and trustees of certain mortgagees of monies due to them respectively for principal and interest on mortgages of part of the premises, the residue of such purchase-money was laid out by the Deputy Remembrancer in the purchase of 3*l.* per cent. Consolidated, and 3*l.* per cent. Reduced Bank Annuities, and the dividends from time to time arising

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arising therefrom, were also received by the Deputy Remembrancer and laid out by him in the said stocks. At the time of making the order which is the subject of this appeal, there was the sum of 202,993*l.* 3*s.* 4*d.* Bank 3*l.* *per cent.* Consolidated Annuities, and the sum of 20,292*l.* 3*l.* *per cent.* Reduced Annuities, which had arisen from the produce of the sale of the estates in the county of *Herts*, and the accumulations thereof standing to the credit of the account of the *King v. Rumbold* general account, the produce of the *Dorsetshire* estates having been wholly exhausted in part payment of the debt due to the Commissioners of the Navy.

By an order of the *Court of Exchequer* made in the cause the *King v. Boyd*, dated the 27th *February*, 1807, it was ordered, upon motion on behalf of the Appellants, that it should be referred to the Deputy Remembrancer to take an account of the several debts and securities in respect whereof his Majesty and the Appellants had any charge upon the said estates in the county of *Herts* or any of them, and of what monies were due to them respectively thereon, and to report their priorities to the Court.

In pursuance of that order, the Deputy Remembrancer made his report, bearing date the 16th day of *July*, 1808, and thereby, after reporting the said bond-debt due from the Bankrupts to the Commissioners of the Navy, he found that a commission of bankrupt dated 25th *March*,

1800,

1800, had duly issued against *Boyd* the elder, *Benfield*, *Boyd* the younger, and *Drummond*, and that the Appellants were chosen assignees of their estate and effects, that a bargain and sale thereof was accordingly made to them on the 5th of *April* following. He also found that the charge of his Majesty on the said estates in the said county of *Herts*, seized under the said writs of extent, in respect of the contract and bond of the 7th *February*, 1798, was *first* in point of priority; that the charge of his Majesty in respect of the said draft, bearing date the 9th *June*, 1798, issued in consequence of the said *Treasury* warrant dated 4th *December*, 1797, was second in point of priority; and that the charge of the Appellants *Charles Wall* and *Jonathan Hoare*, under certain indentures of lease and release of the 3d and 4th *July*, 1798, was third in point of priority; that the said charge of the said Appellants *William Mainwaring*, *Thomas Reid*, and *George Ward*, under the said bargain and sale, was last in point of priority.

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And he further certified that he found there was due, in respect of the said contract with the Commissioners of his Majesty's Navy and bond of the 7th of *February*, 1798, the whole of the sum of 50,000*l.* mentioned in the said contract, together with the sum of 26,102*l.* 14*s.* 9*d.* for interest in respect thereof, at the rate of 5*l.* per cent. per annum, which he had computed as therein mentioned; and he found that his Majesty had received and retained in respect of

arising therefrom, were also received by the Deputy Remembrancer and laid out by him in the said stocks. At the time of making the order which is the subject of this appeal, there was the sum of 202,993*l.* 3*s.* 4*d.* Bank 3*l.* *per cent.* Consolidated Annuities, and the sum of 20,292*l.* 3*l.* *per cent.* Reduced Annuities, which had arisen from the produce of the sale of the estates in the county of *Herts*, and the accumulations thereof standing to the credit of the account of the *King v. Rumbold* general account, the produce of the *Dorsetshire* estates having been wholly exhausted in part payment of the debt due to the Commissioners of the Navy.

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1800, had duly issued against *Boyd* the elder, *Benfield*, *Boyd* the younger, and *Drummond*, and that the Appellants were chosen assignees of their estate and effects, that a bargain and sale thereof was accordingly made to them on the 5th of *April* following. He also found that the charge of his Majesty on the said estates in the said county of *Herts*, seized under the said writs of extent, in respect of the contract and bond of the 7th *February*, 1798, was first in point of priority; that the charge of his Majesty in respect of the said draft, bearing date the 9th *June*, 1798, issued in consequence of the said *Treasury* warrant dated 4th *December*, 1797, was second in point of priority; and that the charge of the Appellants *Charles Wall* and *Jonathan Hoare*, under certain indentures of lease and release of the 3d and 4th *July*, 1798, was third in point of priority; that the said charge of the said Appellants *William Mainwaring*, *Thomas Reid*, and *George Ward*, under the said bargain and sale, was last in point of priority.

And he further certified that he found there was due, in respect of the said contract with the Commissioners of his Majesty's Navy and bond of the 7th of *February*, 1798, the whole of the sum of 50,000*l.* mentioned in the said contract, together with the sum of 26,102*l.* 14*s.* 9*d.* for interest in respect thereof, at the rate of 5*l.* per cent. per annum, which he had computed as therein mentioned; and he found that his Majesty had received and retained in respect of

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of the said sum of 100,000*l.*, issued as aforesaid under the said *Treasury* warrant, several sums of money, amounting in the whole to the sum of 43,334*l.* 1*s.* 3*d.*, whereby the said sum of 100,000*l.* was reduced to the sum of 56,665*l.* 18*s.* 9*d.*, which he found to be then still remaining due to his Majesty on balance, in respect of the said 100,000*l.*: and he found that the whole of the said principal sum of 80,000*l.*, secured by the said indenture of mortgage of the 3d and 4th *July*, 1798, was still remaining due to said Appellants *Wall* and *Hoare*, with interest thereon, at the rate of 5*l.* *per cent. per annum* from 4th *July*, 1798, which interest to the said 16th *July*, 1808, the date of his said report, amounted to the sum of 40,131*l.* 10*s.*, making the total amount of principal and interest due in respect of the said mortgage, the sum of 120,131*l.* 10*s.*

That report was confirmed by the Court on the 20th *July*, 1808.

A similar order was made on 21st of that month, for ascertaining the priority of the charges on the *Dorsetshire* estates; and in pursuance thereof the Deputy Remembrancer made his report the 4th *May* 1809, and after reporting a mortgage by *Benfield*, by indentures of lease and release, and assignment, bearing date the 6th and 7th *June* 1798, of *Benfield's* freehold and leasehold estates in the county of *Dorset*, seized under such extents as aforesaid, to *Abraham Roberts* and *Thomas Smith*, since deceased, for securing 50,000*l.* and interest;

interest; and also after *finding the debt due to the Commissioners of the Treasury*, in a similar manner as he had found the same in his last mentioned report; the Deputy Remembrancer stated that he had found that the charge of his Majesty on the said freehold estates, in the said county of *Dorset*, seized under the said extent in respect to the contract and bond, to the Commissioners of the Navy, of the 7th of *February* 1798, was first in point of priority; that the charge of the said mortgagees on the said freehold estates was second in point of priority; that the charge of his Majesty upon the said freehold estates, in respect of the draft 9th *June* 1798, was third in point of priority. And he found that the charge of the mortgagees upon the said leasehold estates, was first in point of priority; that the charges of his Majesty thereon, in respect of the said contract and bond of the 7th of *February* 1798, and the said draft of the said 9th *June*, 1798, was second in point of priority; the writs of extent for the recovery of the sums therein particularly mentioned, having issued and been executed on the same day respectively; and that the said charge of the appellants *Mainwaring, Ward, and Reid*, upon the said freehold and leasehold estates, was last in point of priority. And he further certified, that he had computed subsequent interest on the said sum of 50,000*l.* due to his Majesty, *in respect of the said contract and bond* from the date of the said former report, at the like rate of 5*l.* *per cent. per annum*, to the date of that, his report; which added to the several sums of 50,000*l.* and 26,102*l.*

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26,102*l.* 14*s.* 9*d.*, made the total principal and interest due, in respect of the said contract and bond to be 78,102*l.* 14*s.* 9*d.*: and he found that the whole of the said principal sum of 50,000*l.* secured by the said indentures of mortgage of the 6th and 7th *June*, 1798, was still remaining due to the mortgagee with interest, from the 7th *June*, 1798, which interest to the 4th of *May*, 1809, the date of his report, deducting the property-tax, amounted to 76,090*l.* 6*s.* 7*d.*; and he found, as in the former report, that the said sum of 56,665*l.* 18*s.* 9*d.* was still remaining due to his Majesty on balance, *in respect of the said 100,000*l.* advanced in pursuance of the Treasury warrant* before mentioned.

That report was confirmed on the 15th *May*, 1809.

By an order made on the 18th of *May*, 1809, the purchasers of the several estates, who had paid their purchase-money, and the Solicitor of the *Admiralty*, and the Appellants, and the widow of *Benfield* who claimed dower, were required to shew cause why the balance due to the *Treasury* should not be paid.

Ultimately, by the order of the 22d *December*, 1815, made in all the causes, it was ordered that it should be referred to the Deputy Remembrancer to compute subsequent interest, at the rate of 5*l.* per cent. *per annum*, on the principal sum of 50,000*l.*, part of the 78,102*l.* 14*s.* 9*d.* certified to be due to
his

his Majesty on the said *contract and bond*, from the said 4th day of *May*, 1809, up to which time it had then already been computed down to the time of the payment of such interest as thereafter directed, and to add the amount thereof to the balance of the said debt which should be remaining unpaid, out of the produce of the said *Dorsetshire* estate:—and that the Deputy Remembrancer should then sell so much of the residue of the sum of 202,993*l.* 3*s.* 4*d.* Bank 3*l.* per cent. Consolidated Annuities, then standing to the credit of the account, “*The King against Rumbold’s* general account,” as would raise such balance of debt, and interest, and that he should pay such balance to the Treasurer of his Majesty’s Navy, in full discharge of the said debt and interest due on the said contract and bond; that the Solicitor of the *Admiralty* should thereupon deliver up the said bond to the Appellants *Mainwaring, Reid, and Ward*, to be cancelled; that it should be referred to the Deputy Remembrancer to tax the costs, charges, and expenses incurred by the *Admiralty*, in prosecuting the said extents in the counties of *Dorset* and *Herts*, and also an extent into the city of *London*, for the recovery of the said bond debt.

And it was further ordered that the Deputy Remembrancer should tax all the costs incurred by *A. Robarts*, (the mortgagee,) in those matters; that he should tax the costs of certain other persons named in the said order; that he should tax the costs to that time, incurred by the *Treasury* in

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in prosecuting the said several extents into the counties of *Dorset* and *Herts*, and into the city of *London*, for the recovery of the said debt due to his Majesty, in respect of the sum of 100,000*l.* issued under the warrant; and that he should, so soon as the said costs should be taxed, sell so much of the residue of the said 202,993*l.* 3*s.* 4*d.* Bank 9*l.* per cent. Consolidated Annuities, and 20,292*l.* Bank 3*l.* per cent. Reduced Annuities, standing to the credit of the account "*The King v. Rumbold*, general account" as should be sufficient to raise the amount of all the said costs, and that he should thereout pay the costs of the *Admiralty* to the Solicitor of the *Admiralty*, the costs of the mortgagees and the purchaser to their respective Solicitors, and the costs of the *Treasury* to the Solicitor for the affairs of the *Treasury*.

And it was thereby directed by the Court, that the said several sums thereinbefore directed to be paid and transferred, by and out of the funds which had arisen by the sale of the said estates in the county of *Herts*, were to be considered as having been so raised and paid by the application, in the first place, of the stock purchased with the monies first paid into Court, in respect of the said estates in the county of *Herts*, and, in the next place, by the progressive application of the stock purchased with the monies next subsequently paid into court in respect of the said estates, and the accumulations which had arisen upon the stock so purchased, until sufficient funds were in Court to satisfy the said payments and transfers respectively

respectively thereinbefore directed to be made by and out of the said last-mentioned funds: and (after reciting that by the report of the 16th day of *July*, 1808, it was reported that the sum of 56,665*l.* 18*s.* 9*d.* then remained due to his Majesty from the said *Paul Benfield* and others, in respect of the sum of 100,000*l.* issued to them under the royal sign manual warrant of the 4th day of *December*, 1797,) it was thereby declared by the Court, that after the said last-mentioned payments and transfers should have been completed, his Majesty was entitled to so much of the residue of the said last-mentioned funds as had arisen from monies to the amount of 56,665*l.* 18*s.* 9*d.*, which were brought into Court in respect of the said last-mentioned estates, next and immediately after the bringing into Court of so much money in respect of the said estates as should, with the accumulations made thereon as aforesaid, have satisfied the said last-mentioned payments and transfers in the manner thereinbefore directed. And it was further declared that his Majesty was also entitled to the dividends and accumulations which had arisen upon so much of the said residue of the said last-mentioned funds as should appear to have been purchased with the said monies to the amount of 56,665*l.* 18*s.* 9*d.*, and with the dividends and accumulations thereof.

And it was ordered that the said Deputy Remembrancer should ascertain what portion of the said last-mentioned funds, and of the accumulations thereof, was applicable to the payments and transfers

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transfers first thereinbefore directed to be made by and out of the funds which had arisen by sale of the said estates in the county of *Herts*, and what portion thereof had arisen from the investments of the said monies to the amount of 56,655*l.* 18*s.* 9*d.*, and of the dividends and accumulations thereof. And it was ordered that the said Deputy Remembrancer should sell so much of the residue of the said sums of 202,993*l.* 3*s.* 4*d.* Bank 9*l.* *per cent.* Consolidated Annuities, and 20,292*l.* Bank 3*l.* *per cent.* Reduced Annuities, as should appear to have been purchased by the said monies to the amount of 56,655*l.* 18*s.* 9*d.*, and with such dividends and accumulations as had arisen thereon as aforesaid : and that he should pay the produce thereof into the receipt of his Majesty's *Exchequer*, to the account of "Writs of ex-
tent issued against Messrs. *Boyd, Benfield* and
"Co. consolidated fund": and in regard to any surplus that might remain of the said several funds or either of them, after the several appropriations before directed, or as to certain sums set apart subject to certain inquiries therein mentioned, all parties interested therein were to be at liberty to apply to the Court touching the same, as they should be advised.

In pursuance of that order, subsequent interest had been computed on the 50,000*l.* due on the said contract and bond, and that sum and the interest were afterwards paid without prejudice to this appeal.

The

The parts of the order appealed against were so much thereof as directed the Deputy Remembrancer to tax the costs incurred *by the Treasury* in prosecuting the several extents into the counties of *Dorset* and *Herts*, and the city of *London*, for the recovery of the debt due to his Majesty in respect of the sum of 100,000*l.* issued under his Majesty's warrant to the above persons ;—and that the Deputy Remembrancer should, so soon as the said costs should have been taxed, sell so much of the residue of the said sums of 202,993*l.* 3*s.* 4*d.* Bank 3*l.* *per cent.* Consolidated Annuities, and 20,292*l.* Bank 3*l.* *per cent.* Reduced Annuities, standing on the credit of the said account, “ the *King* against *Rumbold*, general account”, as should be sufficient to raise the amount of the said costs ;—and that he should therewith pay, amongst other costs, the costs of the *Treasury* to *Henry Charles Litchfield*, Esq. the Solicitor for the affairs of his Majesty's *Treasury*,—and whereby it is declared by the Court, that after the said payments and transfers should have been completed, *his Majesty is entitled to so much of the residue* of the said last-mentioned funds, as had arisen from monies to the amount of 56,665*l.* 18*s.* 9*d.* which were brought into Court in respect of the said last-mentioned estates, next and immediately after the bringing into Court of so much money, in respect of the same estates, as should, with the accumulations made thereon as aforesaid, have satisfied the said last-mentioned payments and transfers in the manner thereinbefore directed ;—and whereby it is further declared, that his Majesty *is also entitled to the dividends*

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*dividends and accumulations which have arisen upon so much of the said residue of the said last-mentioned funds as should appear to have been purchased with the said monies to the amount of 56,665*l.* 18*s.* 9*d.* and with the dividends and accumulations thereof;—and whereby it is ordered, that the said Deputy Remembrancer should ascertain what portion of the said last-mentioned funds, and of the accumulations thereof, is applicable to the payments and transfers first thereinbefore directed to be made by and out of the funds which have arisen by sale of the said estates in the county of *Herts*, and what portion thereof has arisen from the investments of the said monies to the amount of 56,665*l.* 18*s.* 9*d.* and of the dividends and accumulations thereof;—and whereby it is ordered, that the said Deputy Remembrancer should sell so much of the residue of the said sum of 202,993*l.* 3*s.* 4*d.* Bank 3*l.* *per cent.* Consolidated Annuities, and 20,292*l.* Bank 3*l.* *per cent.* Reduced Annuities, as should appear to have been purchased by the said monies, to the amount of 56,665*l.* 18*s.* 9*d.* and with such dividends and accumulations as have arisen thereon as aforesaid; and that the said Deputy Remembrancer should pay the produce thereof into the receipt of his Majesty's *Exchequer*, to the account of writs of extent issued against the said Messrs. *Boyd, Benfield* and Company, consolidated fund.*

The appeal against that order was founded upon the following reasons, which were subscribed "*S. Romilly*," "*John Fonblanque* :"—

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First. For that, when a Court of Equity takes upon itself the application of a fund for the payment of debts or otherwise, no part of such fund is to be considered as appropriated to any particular claim without the express direction of the Court, and that if such fund be productive of benefit, such benefit belongs to those who would have been affected with the loss, if any loss had accrued thereon.

Second. That no appropriation was made by the Court of *Exchequer* of any part of the monies paid into Court, or of the stock purchased therewith prior to the last order now appealed from, and that if such stock had fallen in price, the loss would have fallen on the debtor's estate.

Third. That by such retrospective application, the debt due to the Lords Commissioners of his Majesty's *Treasury*, though only a simple contract-debt in its creation, is made to carry interest.

Fourth. That the case is not such as to entitle the Lords Commissioners of his Majesty's *Treasury* to the costs of the proceedings.

Upon the part of the Respondent, the order, it was submitted, was maintainable, and ought to be confirmed for the following reasons, subscribed "*R. Gifford,*" "*S. Gaselee :*"—

First. The debt, though originally on simple contract,

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contract, on being found by the inquisition, became a specialty debt, and from that time and the actual seizure of the property under the extents, or at all events from the 20th day of *July*, 1808, when the said debt was liquidated, and by the report of the Deputy Remembrancer and the confirmation by the Court, ascertained to amount to the sum of 56,665*l.* 18*s.* 9*d.*, (which is the period fixed upon by the order) so much of the produce of the estates as were sufficient to answer that debt became the property of the Crown, the Crown might have applied for and obtained an order for the payment of it out of Court.

It was however suffered to remain, and has been made productive, and having accumulated by the addition of the dividends from time to time received upon it, the Crown must be considered entitled to that accumulation as arising from the use and employment of its own funds.

Second. Another way of considering it might be upon the footing of interest; and in the case of the *Drapers' Company v. Davis*, 2*d Atkyns*, 211, Lord Hardwicke says "The Court often decrees interest from the time the demand is liquidated, though the debt did not carry interest in its own nature": and in that case the Court gave interest on the arrears of an annuity from the time the Master's report was confirmed (a period of twenty-eight years), in favour of the representative only of annuitants. The present case is still stronger in favour of the Crown, which only

only seeks to have the accumulations made from the use of its own property.

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Third. With respect to the costs, they are expressly given by the 25 *Geo.* 3. c. 35. s. 1.

The questions intended to be raised, and to be now determined by the highest authority, on this appeal, were those which have been already judicially decided by the majority of the Court of *Exchequer*, in the case of the *King v. Mainwaring* (a).

They were, 1st. Whether there had been at any time, and when first, a due and effectual appropriation of the fund to the Crown, converting a simple contract debt into a specialty, so as to carry interest, and

2dly. Whether the Crown was entitled to the costs of the proceedings which had been resorted to on the part of the *Treasury*, for the recovery of what remained due of the original debt of 100,000*l.*

When the Counsel for the Appellants had begun to state their case, the *Attorney-General* suggested a doubt *in limine*, arising on the state and nature of the proceeding appealed against, as to the *House of Lords* having an appellate jurisdiction in the case now attempted to be brought before them, for reviewing the opinion of the Court of *Ex-*

(a) *Anie*, Vol. II. p. 67.

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chequer on which they had founded the order appealed against. It was objected that the subject-matter of the appeal, being merely an independent *interlocutory order* of the Court of *Exchequer* as a court of law, and made upon *motion*, there being *no cause* depending, and no judgment or decree having been pronounced, it could not be submitted to the revision of the House, or brought under their consideration, as matter of appeal to their appellant authority.

Upon that preliminary objection being taken to their jurisdiction, the House ordered the matter to stand over, that an opportunity and time might be given to counsel on either side to prepare for the argument of that material and necessarily prior point: and now

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Fonblanque and *Wetherell*, on the part of the Appellants, contended that the House had jurisdiction to entertain this appeal.

Having entered very minutely into the history of the rise and progress of the appellate jurisdiction (derived from the King) of the *House of Lords*, which was, in the early periods, *original* as the *magnum concilium* of the realm, as distinguished from the *concilium ordinarium*, stating at some length and maintaining very many of the propositions to be found in *Hargrave's* edition of *Lord Hale's* Treatise on that subject, they applied them to illustrate the nature and extent of that jurisdiction, and to shew that the order of the
Court

Court of *Exchequer*, which had been appealed from in this case, was within that jurisdiction.

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They founded their arguments, in support of that proposition, mainly on the assumption that the order, which was the subject-matter of the present appeal, was, in form and substance, a decretal order of a Court of Equity, and whether it were made in a cause or not, was an order in the nature of a final determination pronounced by the barons, in respect of a matter within the equitable jurisdiction of the Court of *Exchequer*.—This, they asserted, was manifest from the nature and course of the proceedings, and from the form and words and the object, end and terms of the order appealed from, and of the other orders which had been made from time to time in the cause. Being such an order, they contended that it was appealable from in the first instance to this House without an intermediate writ of error.

They admitted, *in limine*, that there were many matters in respect of which orders made therein by the various courts were not appealable from to the *House of Lords*. Such were orders made in ecclesiastical courts, which was by resolution of the House, and in Plantation and Admiralty causes, because they were without the jurisdiction, and orders in matters of idiocy and lunacy, because they were under the authority of the Privy Seal. In cases of bankruptcy also, the different statutes had placed the orders of the Court of *Chancery* out of the exercise of the wholesome jurisdiction

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jurisdiction of appeal to this House. But they insisted that the matter of the present appeal was not one of those, and that it bore no analogy to either; and that consequently no reasoning founded on the existence of such exceptions could be applied in support of the position, that the present appeal could not be entertained.

Referring the House again to the principle and the original source of their general jurisdiction, and the learning on that subject collected in *Hargrave's* edition of the "*Treatise of Sir Matthew Hale*," they submitted that the doctrine of that high authority strongly maintained the proposition, that this House had and might exercise appellate jurisdiction in such cases as the present.

In further support of that proposition, they adverted to the various instances wherein appeals on similar matters had been received by the House by way of precedent, which were furnished by the printed journals of the House. These, they submitted, established by the usage that the House had generally an appellate jurisdiction in cases where orders had been made by courts of equity, under circumstances similar to those of the present case, where the subject-matters of appeal had been *summary orders* of the Court of *Chancery*, made upon petition merely, *although no suit was pending* or had been instituted. That objection, it was anticipated, would be mainly relied upon by the counsel for the Respondents in this case, as
withdrawing

withdrawing from the appellate authority of the House the order now attempted to be brought under its consideration for the purpose of review.

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The principal cases selected for that purpose on which they professed mainly to rely were the following (a):—

The *Earl of Findlater* reported from the Lords Committees appointed to consider of the appeal of *A. C. Lochman* and *Elizabeth* his wife, complaining of two orders made by the *Lord Chancellor* the 8th September and 21st October last, refusing an allowance of interest to the Appellants for money paid into the hands of *Mr. Dormer* one of the late Masters; also the appeal of his Majesty's *Attorney-General* at the relation of *William*, Archbishop of *Cashell*, in *Ireland*, and others; and the appeal of *Prideaux Sutton* Clerk, and others, both in relation to interest of the suitor's money, and to search precedents of receiving appeals of this nature, and report to the House: "That the Committee have considered "the said appeals, and have inspected the journals in relation to the matter to them referred, "and acquaint your Lordships that upon inspection they find the following precedents of appeals from summary proceedings of the Court "of *Chancery*:—

Report on consideration of three appeals of the suitors in *Chancery*.

"On the 14th of *February*, 1721, an appeal of

(a) Extracted from the journals of the *House of Lords*, Vol. XXIII.—pp. 35-36. *Anno* 1726.

Precedents of appeals from summary proceedings of the Court of *Chancery*.

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“ the *Lady Wenman* (a), complaining of certain
“ orders of the Court of *Chancery*, particularly of an
“ order whereby the Petitioner was committed to
“ the *Fleet* for a contempt, in not yielding obe-
“ dience to the several orders of the said Court,
“ was read, and ordered to be considered. On the
“ 17th of the same month, the said Appeal was
“ considered, and *Sir W. Osbaldeston* was ordered
“ to answer, who accordingly did put in his
“ answer, thereby submitting it to the House
“ whether the Appellant had properly appealed
“ in a case of this nature; and the said answer
“ being read, a Committee was appointed to in-
“ spect precedents how far this House hath pro-
“ ceeded in appeals in like cases; and on the 5th
“ of *March* following, report was made from the
“ said Committee of divers cases which they
“ thought proper for the consideration of the

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Sir William
Osbaldeston.

(a) Upon reading the petition and Appeal of *Susannah Lady Wenman*, wife of *Richard, Lord Viscount Wenman*, of *Tuan* in the kingdom of *Ireland*, complaining of certain orders of the *High Court of Chancery* of 27th *October*, 1718, the 20th *January*, 1720, and particularly of an order of the Court of the 19th of *January* last, whereby the Petitioner is committed to the prison of the *Fleet*, for a supposed contempt in not yielding obedience to the several orders of the said Court, and to the precepts of the commands in the said order mentioned for producing the said *Lord Wenman*, made upon the application of *Sir W. Osbaldeston*, Bart., in the prosecution of a Commission of Idiocy against the said Lord, and praying that the said *Sir W. Osbaldeston* may answer the premises, and shew cause, if he can, why the said orders, so far as the same relate to the Petitioner, should not be set aside and reversed, and the Petitioner discharged from her said imprisonment, and otherwise relieved.—*Journ. Dom. Proc.* Vol. XXI. p. 688.

“ House;

“ House; and the same being read was ordered
 “ to be taken into consideration the next day, on
 “ which day the consideration of the said report
 “ was put off to a further day, before which time
 “ the Parliament was prorogued.

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“ On the 21st *March*, 1723, an Appeal of the
 “ *Lady Teynham*, complaining of two orders of
 “ the Court of *Chancery* made upon the petitions
 “ of *Dacre Barret Lennard*, Esq. and the said
 “ *Lady Teynham*, in relation to the guardianship
 “ of her infant son, was presented and read; and
 “ the said *Dacre Barret Lennard* was ordered to
 “ answer, who having answered accordingly, a
 “ day of hearing was appointed as usual, and on
 “ the 16th of *April*, 1724, the said cause was
 “ heard, and the orders of the Court of *Chancery*
 “ reversed.

“ And the Committee think proper further to
 “ acquaint your Lordships, that they do not find
 “ any precedent where any appeal from any sum-
 “ mary proceedings has been refused.”

Which Report being read, the following orders
 were made :—

“ Upon reading the Petition and Appeal of *A.*
 “ *C. L. &c.*, Ordered, that the *Attorney-General*
 “ have a copy of the said appeal, and do put in
 “ such answer thereto, in writing, as he shall
 “ think proper, on or before *Monday* the 27th
 “ day of this instant, *February*.

“ In

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" In *Sutton et al.* Appeal, the same order.

" In *Archbishop of Cashell et al.* same order, substituting for, ' the *Attorney-General* ' ' his Majesty's *Serjeant at Law.* '"

[The LORD CHANCELLOR observed that it might be taken to be a general principle, that the interlocutory orders of the Court of *Chancery* might be appealed against, but that no appeal lies from those of the Courts of Common Law.]

On that same point in this question they cited; as a strong authority, and precisely applicable; the case of *Warner v. North* (a) from *Shower*: There an appeal was received " from a decree " overruling exceptions taken by the Appellant to " a decree made by the Commissioners for Charitable Uses, concerning a gift by *Bishop Warner's* " *Will*" and the parties were ordered to answer, when (both sides having been heard by counsel) the decree was affirmed.—Between that and the present proceeding, it was insisted, there was a strict analogy, and they cited the authority of *Mr. Justice Blackstone* (b), who states " that matters of " charitable use and of extent are to be treated as " a cause throughout." The proceedings in both cases (they urged) were very analogous, those respecting charitable uses emanating from the *Petty*

(a) *Shower*, Parl. Ca. 110.

(b) *Commentaries*, Vol. III. ch. 27. p. 427, 428.

Bag-Office; the law side of the *Chancery*, as extents do from the law side of the *Exchequer*.

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They finally cited, as a conclusive authority for their proposition, the case of the appeal in *Lord Wharton v. Squire (a)*. That was an appeal from an order of the Court of *Exchequer* of the 15th of *July*, 1701, made for setting aside a former order made upon motion on the part of the Appellant. It had been thereby ordered, that a certain commission issued out of that court (15 *Jac.*) together with six several articles of instruction, and eight several schedules thereto annexed, purporting to be a boundary and survey of the honor of *Richmond* and the lordship of *Middleham*, in the county of *York*, taken by virtue of that commission should be left in the hands of Mr. *Thompson*, one of the Attorneys, but should not be received as a record or filed, nor any use made thereof, or of the enrollment thereof, until further order.

The order so appealed from for setting aside the above order, and for allowing of the commission as a record, and that it might be filed, was made on motion on behalf of *Sir W. Robinson*, Bart., and others.

In support of the appeal, it was stated that the Appellant having a cause in *Chancery* wherein the Respondent was Defendant respecting the bound-

(a) Lords' Journ. Vol. XVII. p. 277.—and *Colles's Cases* in Parliament, p. 270.

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aries, and finding by the Defendant's answer and cross bill, that a pretended survey was much relied on, he caused search to be made for it, and none could be found; that he afterwards discovered that the survey had been brought out of *Yorkshire*, and privately delivered to *Thompson*, who had procured it to be enrolled after it had been taken off the file, and had been twenty-eight years out of the custody of any sworn Officer of the Court; and that it was manifestly imperfect, wanting schedules, verdicts, depositions, plots and maps.

The Respondent, on the other hand, relied on the survey as having been made use of as a record on a trial at bar in the *Queen's Bench* some years ago. And it was urged, that *Squire* and *Thompson* were advised that *this petition was not properly an appeal, but an original complaint against them, or rather against the Court of Exchequer*, for a matter relating to the safe custody of the records of that Court, and about which no suit was ever depending in that Court between them and the *Lord Wharton*, so that they could in no sort be made parties to the said petition and appeal, and therefore they, 7th *January*, 1702, petitioned the Lords, setting forth the said matters at large, and prayed to dismiss *Lord Wharton's* petition, and discharge the order for their answering thereto. But the Lords, 22d *January*, 1702, ordered that *Squire* and *Thompson* should answer *Lord Wharton's* petition. *Lord Wharton* on the 25th *January*, moved the House that *Thomp-*

son should be left out of the order for answering his petition, and obtained an order that *Thompson* should not be obliged to answer. *Squire* had answered and said, that *Charles Bathurst, Esq., Sir W. Robinson, Bart.,* and others, were Defendants with him in the said suit in *Chancery*, and Defendants in a cross cause in that court, and therefore insisted they ought to be made parties to this appeal together with Respondent, (if being a party to a cause in *Chancery* were any proper foundation for making Respondent a party to this petition,) complaining of an order of the Court of *Exchequer* with intent to use the same as evidence. As to the charge of Respondent's contrivance, he hoped the House would not take cognizance of that, but refer the Appellant to the due course of law in cases of such undue practices.

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The result was, that the House of Lords ordered that the officers of the *Exchequer* should bring before them the roll of the 15th *Jac.*, the affidavits and the office book, and the survey. And on the 12th of *February*, 1702, after hearing counsel upon the petition and appeal of *Lord Wharton*, they ordered that a trial should be had at the bar of the Court of *Common Pleas* on a feigned issue, whether the skins of parchment directed by the order to be filed, were the perfect, unaltered, exact and entire commission and return first filed in the *Exchequer* in the 16th of *James*,—proof of the issue to lie on Respondent,—the same not to be used as evidence in the mean time in any Court,

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Court, nor be allowed as evidence for the Plaintiff on the trial;—the verdict to be certified and returned to the House by the Court of *Common Pleas*.

[*Lord REDESDALE*.—The House would hardly at the present day, I should think, act upon the jurisdiction assumed in that case.(a).]

Upon these authorities they submitted that summary orders made by Courts of Equity were the subject-matter of immediate appeal to this House. They then proceeded to maintain that the order now appealed from was such an order: first, according to the general practice and jurisdiction of the Court of *Exchequer* in matters of revenue, and proceedings under extents; and secondly, under the special authority given to the Court in such cases by the 25 *Geo. 3. c. 35*.

On the first point they directed the attention of the House to the nature of the order which had been made, and the circumstances under which it had been applied for, and the fact that it had been obtained on the part of the Crown.

The cause, they would admit for the sake of argument, had been determined, and was at an end, though that might be disputed, as the orders were entitled in a cause, or rather in causes, by

(a) See *Hargrave's Edition of Hale's Treatise on Jurisdiction of Dom. Proc.* Pref. p. 196.

the Court itself. But waving that, they had been disposed of in such a manner as that the parties now appealing did not complain of the judgment of the Court. By the original order the real estates of the Bankrupts were directed to be sold before the Deputy Remembrancer, who was ordered to take a general account as amongst all the claimants, and to ascertain the nature of their claims, and declare their respective priorities. All this was done, and the assignees (the Appellants) do not object to any part of the proceedings so far. But when the Crown applied to the Court *that it might be referred back to the Deputy Remembrancer, to compute interest claimed to be due to the Crown, in respect of money issued on a Treasury warrant, which had not been duly applied, constituting merely a simple contract debt, and that on so large a sum as 56,655l., and for so long a period as from the 6th of July, 1808, to the time of payment (the order being made in 1815,)*—it then became the duty of the assignees on behalf of the bankrupt's estate to resist that claim, on principles of law and equity, upon the ground that there had not been any such appropriation of the part of the fund in Court, claimed by the Crown, as entitled the Crown to the dividends and interest accruing on the amount of the Crown debt. They failed to do so successfully before the Court of *Exchequer*, and the order was ultimately made, although a very able and experienced member of the Court, who was afterwards Chief Baron (*Mr. Baron RICHARDS*,) had strongly expressed his dissent, on the grounds of the

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the opposition then made to the obtaining the order by the now Appellants.

Under those circumstances it was now contended that the order was either a decretal order made in a cause: or it was an independent order pronounced by a Court of Equity having competent jurisdiction; and in either case it was conclusive as against the Appellants, who, if this appeal did not lie would be remediless, and inextricably bound in a matter of very large amount and importance, involving questions of law and equity, in respect of which there had begun a serious difference of opinion amongst the members of the Court by whom it had been made. It being a mere order, no writ of error could be brought; if it were, as represented, a proceeding at law because there was no record; but being an order made by a Court of Equity, as it was so appealed lay to this House, as was fit and proper, and to mention justice sit; and it would be a case of great hardship and without parallel, if it were not so.

That this was an equitable order, in point of form and substance, if well founded, they urged, was apparent from its nature and effect, and from all its incidents. The subject-matter of it was substantially matter for equitable consideration. It was a retrospective appropriation of funds and a determination of a question of equitable claim of late test, depending on the period of actual appropriation.

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propriation as fixed by the Court of Equity. It is not inconsistent with the nature of the proceeding by extent, or the proposition that such a proceeding is a proceeding at law, that all subsequent orders pronounced by the Court should be equitable orders, wholly distinct from the proceedings under the extent, and emanating from the equitable jurisdiction of the Court over such proceedings, in all their stages; the Court of *Exchequer* being constitutionally a Court, not of two separate jurisdictions, existing apart from and independently of each other, but a Court of a blended and amalgamating jurisdiction, at once legal and equitable. When the legal proceeding by extent was at an end, the equitable controul over the funds produced by it came instantly into operation, and under that equitable jurisdiction alone could the order appealed against have been made, or the application even entertained. Such an order is not analogous with any proceeding at law. It was founded on a report by the officer of the Court, who was armed with a commission to examine witnesses upon a reference of an equitable nature, made in the ordinary course of a Court of Equity. Exceptions were taken to the report, and the report was confirmed in the manner of Courts of Equity. The order was applied for upon the confirmation of the Master's report, when all proceedings at law were at an end, and the fruit of those proceedings was in Court waiting the equitable disposition of it amongst the parties claimant, all having equitable rights to be adjusted and discussed. The order as pronounced was made

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not in term time as orders at law are, but in the vacation, at the sittings in *Gray's Inn*, where equitable matters alone are disposed of; and it was brought on in the shape of an application for further directions on the report (a), and it was entered of the equity side of the Court in the King's Remembrancer's office.

To shew that the Court of *Exchequer* were in the practice of exercising a jurisdiction of equitable interference in a summary way on motion in independent instances, in respect of matters of right unconnected with causes or even petitions, they cited two orders from the order books of the King's Remembrancer's office, wherein the Court had so interfered (b).

They then contended, that if, independently of the statute of the 25th of Geo. 3. c. 85, (passed for enabling the Crown to sell more conveniently lands seized under extents, the order appealed from must be held to have been a legal order pronounced by a Court of Law. Under the then existing jurisdiction of the *Exchequer* that statute had given the Court, in such cases, an equitable jurisdiction by the powers which the Legislature had conferred upon it, as being indispensably necessary for the complete exercise of those

(a) Vide *ante*, Vol. II. p. 76.

(b) *Lib. Ord.*—*M. T. 9 Jac.*—Order, *inter Hall and Oldershaw*.

H. T. 9 Jac.—Order, *In Re Fairchild*, and Others, the King's tenants of the Manor of *Orwell*.

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powers. Otherwise, the Court could not adjust in the summary mode of practice prescribed to it by the act, the clashing claims and adverse rights of parties which must inevitably arise in determining, upon "motion or petition to be supported by affidavits, or other proofs," to whom the surplus of the money arising from the sale of the lands seized and sold belonged, and ought to be paid. The present case, they submitted, was a complete illustration of that proposition; and shewed the difficulty which must occur to embarrass the Court, if their summary proceedings under that statute were not to be considered as purely equitable and of the same nature, and to be ordered and directed with the same latitude of authority, as if the Court were determining the matter on the more formal proceeding by bill and decree. It was urged, that the whole scope and object of the act was single and independent. It was to authorize the Court of *Exchequer*, on the mere motion of the *Attorney-General*, to order a sale of the lands of Crown debtors without suit either by information or bill; and to entitle the purchaser to hold the estate as against the Crown, and "all persons claiming under the Crown debtor, unless by a title paramount to and available in law against such extent as aforesaid." That provision necessarily contemplated and recognized full power and authority in the Court to act under that statute, in as integral and large a manner as if it were proceeding in a cause on bill and answer. The second section of the act adopts that construction more directly and strongly. It re-

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cites that "from the want of the deeds and writings relative to the title of such lands, &c., as the said Court of *Exchequer* may decree to be sold under this act," difficulties may arise in the execution of it. It is therefore enacted, that "it shall be lawful for the said Court of *Exchequer* from time to time to make such order touching the production, delivery, and custody of such title deeds, and writings as aforesaid, in the same manner as if a decree had been made by the said Court for a sale of the lands of a Crown debtor, in execution of a trust created for payment of debts by such Crown debtor himself."

This act therefore, they insisted, gave the Court of *Exchequer* an entirely new or extended jurisdiction in matters of extent, and that jurisdiction was wholly and purely equitable. It had substituted for the more formal proceeding of suit by bill in equity proceedings by orders founded upon motion and petition. It had consequently made such motions equivalent to causes by bill and the orders thereupon of equal efficacy with decrees in suits, giving to those orders all the consequences and incidents which followed from and belonged to the more formal decisions of the Court as a Court of Equity. One of the most conspicuous and important of those, was, that an appeal would lie from such orders to this House, in the first instance, as from a decree in a cause, or at least as from an independent order of a Court of Equity.

If

If so, the order now appealed against was such an order, having been made upon the application of the Crown, and consequent upon an order made under the 25 Geo. 3. having all the equitable characteristics and consequences of a decree in a cause, and was therefore the subject of appeal.

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[The Lord CHANCELLOR.—I wish to know if any instance can be produced of an appeal from any order of the Court of *Exchequer*, under the 25 Geo. 3. or the 13 Eliz., having been entertained by this House.

There is nothing, as I conceive it, in either of those statutes to preclude a party from filing a bill in a Court of Equity if it should be necessary or advisable, and in that way he might save his right of appeal. In matters ordinarily determinable by motion or petition, as in cases of lunacy and bankruptcy, it has been always usual for the Chancellor, where the party suggests a desire to appeal, to direct a bill to be filed, instead of proceeding in the common and ordinary course, for the express purpose of affording to either party the opportunity of appealing from his decision.

Lord REDESDALE.—That was the constant practice of Lord Hardwicke.]

It was submitted, that the Court being authorized to proceed under the statute in a summary way, it was a course which best suited the interest of

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of all parties, and the present Appellants had no right to anticipate the order made. Having been made, the only course was to appeal to this House, and a bill could not afterwards have been filed for the purpose of bringing that order either directly or indirectly under the review of the Court. It was in itself as final and conclusive as a decree. In effect it was already a decretal order of a Court of Equity.

They stated, that there were many instances of decretal orders made by the Court of *Exchequer* on petition. Even the case of Sir *Thomas Cecil* (a) was a proceeding not by bill, as it was generally supposed to have been, but by petition, and that appeared from the records of the Court. In consequence of modern regulations, they observed, it had become the practice of the Court of *Chancery* to make many orders on motion and petition, which could only have been obtained before on suit by bill; but that alteration in the practice could not have the effect of destroying the suitor's right of appeal, or of ousting this tribunal of its appellate jurisdiction. They stated, that it had been determined in an important case which underwent very much discussion in the Court of *Exchequer*, that statutes creating new jurisdictions with powers to act in a summary way, did not take away or abridge an inherent controlling authority in other existing courts. For that they cited the cases of

(a) 7 Co. Rep. 19.

Colebrooke and Others v. The Attorney-General and Others (a), and Ex parte Colebrooke (b).

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[**LORD REDESDALE.**—In those cases the Court determined that a bill ought to be filed to give them authority, and that they could not act on petition.

It would be desirable that the House should be informed of the course of proceeding pursued in these cases for obtaining redress by a party aggrieved, by the Crown process of *levari*, before the statute of *Elizabeth*, when the Crown debt had been satisfied out of the issues of the lands seized, which would appear by the Sheriff's accounts. There have been at various periods very many bills filed in the *Exchequer* against the *Attorney-General*, to enable the complainants to avail themselves of the statute of 33 *Hen. 8.*, and that fact gives rise to much difficulty on the present question*.]

It was suggested, that amongst the objections which would arise to the filing a bill in the present case, would be that there were no persons who could properly be made Defendants to the suit, and there was nothing which the Appellants could reasonably pray in the matter. Their sole object was, to rescind an *order* of the Court of *Exchequer* consequent upon a judgment of which they did not complain.

(a) *Ante*, Vol. VII. p. 146.

(b) *Ante*, Vol. VII. p. 87.

* See Observations at conclusion.

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The Appellants' counsel ultimately urged, that if there could be no appeal in this matter, the Appellants who complain of error in an order of the Court of *Exchequer* would be without remedy, however erroneous the order might really be.

The Attorney-General, Gaselee and Wray, for the Respondents, admitting the general jurisdiction of the *House of Lords* as a Court of Appeal from all Courts of Equity, whether against interlocutory and independent orders, or against final decrees, insisted that they had no such appellate jurisdiction in respect of such orders pronounced by Courts of Law, nor any immediate jurisdiction from the judgments of such courts, which could only be brought before them after the intermediate proceeding by writ of error.

The real question therefore to be determined on this preliminary discussion, would be simply whether the order now sought to be appealed against was strictly a legal order made by a Court of Law, or an equitable order of a Court of Equity.

They contended, that the order was a proceeding of the Court of *Exchequer* on a motion made in the matter of an extent; that all extents were in their nature purely proceedings at law, both in form and in substance, having nothing of an equitable character to distinguish them from other legal proceedings; that if there had been any error in the final decision of the Court under the extent, the Appellants should have brought their

writ

writ of error, or that if they were aggrieved by the subsequent order of the Court, they might have filed a bill against the *Attorney-General* under the statute of 23 Hen. 8. c. 39., in either of which cases they might have appealed from the Court of *Exchequer* to this House.



In the present case, however, they insisted that the appeal now attempted to be supported could not be maintained; because as this was a mere independent order of the Court of *Exchequer* acting in a matter within its legal jurisdiction as a court of law, made not in any cause, but on a motion in a matter respecting which no cause was pending, no appeal lay against it, nor could even a writ of error be brought for the purpose of impugning or rescinding it. So clearly was this order of a Court of Law unappealable from, it might as well be attempted to appeal against an order of the Court of *King's Bench* or *Common Pleas* made absolute for a new trial, or for setting aside an award, or even for computing principal and interest on a bill of exchange, or for a *mandamus*, or paying money out of court, or in short any of the various orders of the courts made in the ordinary course of practice. Some of those also, as in the present case, involve grave questions of law, and respect property of very large amount. All the topics of hardship and absence of remedy might therefore be equally pressed in such cases on the attention of this House, in attempting to make them the subject-matters of appeal. So even in equity there were many orders which could not be appealed against,

against, as was the case with all those which were made in matters of idiocy, lunacy, and bankruptcy, unless there should be a cause depending in court in respect of the subject-matter of the order. In the case of *Sheldon v. Fortescue Aland* (a), it was determined that no appeal lies from an order of the *Lord Chancellor* touching lunatics, to the House of Lords, but only to the King in council. In order to obviate the complaint of the party being deprived of the right of appeal by such orders, the course had always been for the Court (if a Court of Law) to suggest and permit that the matter should be so moulded as to be put on record, that it might become the subject of a formal judgment from which a writ of error might be brought, and then an appeal would lie, or (if it were a Court of Equity acting in bankruptcy, &c.,) the *Chancellor* generally recommended a bill to be filed to afford an opportunity of appealing.

In the present case, they submitted, there was another course which might have been pursued by the parties who would now appeal against this order. They might have filed a bill against the *Attorney-General* on the whole matter, alleging the facts of their case, and insisting on their supposed equity, under the 33d of *Hen. 8.*, when all the merits of the case would have been brought before the Court. For that the case of *Sr Thomas Cecil* (b) was cited as a conclusive authority. That was not, however, as had been stated, a case

(a) 3 P. Wms. 108.

(b) 7 Co. Rep. 18.

of petition: it was brought before the Court by bill, and so it was said to have come on by *Lord Coke* himself. As to the proceeding having been termed a petition in any stage of the matter on the records, it was well known that in those days the terms "bill" and "petition" were used synonymously, as convertible terms (a). The statement of that case by *Lord Coke* is the more particularly to be relied on, as he himself took an active part in that proceeding. Another authority on that point is to be found in the case of *Savile v. the Queen Mother* (b), where a demurrer, founded upon the objection that the statute of the 33d of Hen. 8. would not support a bill, was overruled. So in the cases already cited on the other side, *ex parte Colebrooke* and *Colebrooke v. Attorney-General and others* (c), the Court of *Bahequer* (d) determined that the summary mode of proceeding by petition was not the proper course, but that a bill might be filed against the *Attorney-General*, which being afterwards adopted was adjudged to be maintainable on demurrer.

(a) This argument is two-edged, and may be applied to support or destroy either proposition. It shews not only that that which is called a petition may have been a bill, but also that what was called a bill may have been a petition.

(b) Hardr. 502.

(c) *Ante*, Vol. VII. p. 146. But note, that Mr. *Baron Graham*, who reluctantly submitted to the majority of the Court, differed strongly as to the mode of proceeding there suggested to be proper by the rest of the Court.—Vide *ex parte Colebrooke*, pp. 130, 131. and *Crauford and Others v. Attorney-General and Others*, p. 81.

(d) *Ibid.* p. 87.

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The parties urging the reception of this appeal therefore, having ample means of bringing the whole matter before the House in a regular mode, could have no right to state in argument, as they had done, that if no appeal lay from this order of the *Exchequer*, they were conclusively bound and without remedy, if there had been any error or injustice on the part of the Court, or to complain of a hardship which they might themselves have prevented.

In answer to the observations and arguments of the Counsel for the Appellants, founded upon the judicial constitution of the House of Lords as a Court of appellate jurisdiction, and the cases which had been cited as precedents in favour of this appeal from the printed journals of the House, the Respondents' Counsel, admitting the general jurisdiction of the House, insisted that the cases cited merely shewed that substantive orders of the Court of *Chancery*, sitting as a Court of Equity, might be appealed against; and the report that there were no precedents of appeals against similar orders being refused, only tended to shew that no attempt had been made to appeal against such. Yet they contended that there were, as had been already shewn, many exceptions to the universal exercise of even that jurisdiction, as in matters of bankruptcy and other heads of equitable authority. But they still more strongly contended, as the main proposition on which they meant to rely in support of their objections to the admissibility of

the present appeal, that an immediate and direct appeal could not be entertained by this House against an order of a Court of Law.

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The sole question therefore, they submitted, which was now under the consideration of the House was, whether, in point of form and substance, the order of the Court of *Exchequer* of the 22d of December, 1815, was an ordinary legal order pronounced by a Court of Law, or an interlocutory decretal order proceeding from a Court of Equity. If it were the latter, they would admit they ought to answer the present petition of appeal; if it were the former, they insisted that it was not admissible—and that they ought not to be called upon for an answer.

On that question they professed to entertain no doubt. The Court of *Exchequer* they described as being a Court which, whilst it preserved its original nature of a Court constituted for the judicial disposal of matters affecting the King's revenue, in respect of which it was a Court of Law, was also a Court of Common Pleas and a Court of Equity; and that these three independent branches of its jurisdiction were kept as distinct from each other as if they belonged severally to three different courts. The Court of Revenue in the *Exchequer*, they asserted, was strictly and purely a Court of Law, proceeding upon principles and rules of law, and conforming in practice and pleading with that of other Courts of Law, as well in substance as in form. The proceeding by writ of extent, they urged,

judged, was a proceeding peculiar certainly to the Court of *Exchequer*, but, like all its other proceedings on the revenue side of the Court, *coram Baronibus*, it was a proceeding strictly at law from beginning to end, without one characteristic of a proceeding in equity, to differ it from a legal, or to assimilate it to an equitable proceeding. It commenced by writ, it was appeared to and pleaded to as all other legal processes were in the Courts of Common Law, and the same forms were observed. An issue was framed and submitted to a jury, and the judgment is entered up in the ordinary manner, and that judgment might be reviewed as other judgments at law, upon a writ of error, and, finally, from the judgment of the Court of Error an appeal lies to this House. The writ of error in cases of extent was, like other writs of error, from the Court of *Exchequer*, given by the 31st of *Edw. 3.*, and was required to be directed to the Treasurer and Barons. They cited the case of the *King v. Cotton* (a) as furnishing by an instance, in detail, a history and accurately full account of the whole of the proceedings under an extent, from the first process to the final judgment, and the ultimate determination of the Court of Error; the whole of which, they submitted, incontestably proved that the entire course of proceeding therein was throughout a proceeding at law, unmixed with any equitable forms, and completely independent of any matter of equity.

As to the analogy which had been attempted to

(a) Parker's Rep. 112.

be established between the order made in this case and orders made by Courts of Equity, from the mode and time in which the order was made, and the circumstances preceding it,—they observed that the orders of Courts of Law were also frequently made in the same manner, namely, on reference to the Master, and report made thereon, proceeding on equitable principles. This often occurred where the Master was directed to take accounts, and adjust the rights of parties interested in sums paid into Court or remaining in the hands of the sheriff. They were also made out of term time, having reference to the preceding term. The order in question was made in a matter consequent upon a cause *at law*, and by the judge who had decided the cause, and was entitled *in the cause*, and not as a proceeding in equity independent of the cause at law.

To the argument—founded on the proposition that the statute of the 25th Geo. 3. had given the Court of *Exchequer* a new jurisdiction, enabling them to deal with the estate of a Crown debtor in a summary way, and that their proceedings under that act were of an equitable nature, giving to their orders, made by virtue of that act, an equitable character, and clothing them with all the incidents attendant upon decretal orders of the Court of *Chancery*,—they answered, that there was no foundation for that proposition; that there was nothing in the act to warrant it, or to make the proceedings of the Court under that statute proceedings on the equity side of the Court, and that

in matters which, up to a certain period and until the Court was called on to act under the statute, had been proceeded upon on the *law side* of the Court. It would be quite an anomaly that a cause should be a cause at law for one purpose, and a matter of equity for another, and that it should be proceeded with according to legal forms and on legal principles up to a certain stage or to its conclusion, and then that it should at once assume an equitable character, making all further proceedings or consequential orders proceedings in equity or equitable orders. The statute, they submitted, related expressly to proceedings by extent, and had reference to the practice as existing in such cases at the time the act was passed: and the whole object of it was merely to provide a speedier mode, by sale of the Crown debtor's lands in all cases of extent, for giving the Crown the benefit of its judgment, when obtained through the medium of the prerogative process.

On the whole therefore, the Counsel for the Respondents submitted to their Lordships, that the House would act conformably with their own practice, with respect to their appellate jurisdiction over the judicial Courts of Record, by dismissing the Petition of Appeal.

Lord ELDON, Chancellor.—It is prudent, undoubtedly, that we should take some time in this case to consider of our judgment upon this important preliminary point, raised in respect of the jurisdiction of this House. The other question, whether

whether this final order of the Court of *Exchequer* were such as should have been made, is a point which we have not yet approached, as the first question is whether we should be entitled to examine this at all in the way in which it is brought before us. In determining that first question, we should take care that we do not assume a jurisdiction which we have not, as well as not to omit doing that which we have a right by our acknowledged jurisdiction to do. As to that view of the point brought under our consideration, I do not think that the circumstance which has been mentioned, with respect to the proceedings of the *Attorney-General* in 1800 and since, (as it strikes him as well as myself) is very material, because I do not apprehend that if they have been going on in the way that has been stated ~~by consent~~, that would finally give us jurisdiction, or that we should therefore be entitled to assume jurisdiction. But when it is said that the proceeding itself must be considered as partaking of an equitable character from the beginning to the end, I think that is not so, and it is material that we should notice that. I take a case in bankruptcy for instance, and I ask how many cases in bankruptcy there are where the question is brought before the Master and not sent to Commissioners, and where a decision pronounced in this way is final, and where there is no appeal from the authority of the Court, when it has proceeded upon the facts found in the same way as proceedings in causes. I do not apprehend that because this summary mode of proceeding is given

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by the act of the 25th Geo. 3., it therefore takes away from the subject the right of proceeding in a different manner. It would not have been any thing very extraordinary if the Court had been informed that it was a question of very considerable consequence, with respect to the application of the money in the way it is directed by the last order, and if it had been thereupon suggested by the Court that the question was of sufficient importance to justify proceedings of a more formal kind, that they should have made an order for permitting a different mode of proceeding, that the parties might have an opportunity of putting the matter in another shape, for the purpose of carrying the question further, so as to have given appellate authority to this House. It would have deserved the consideration of the *Exchequer*, whether they would not have done well, in this case, to have adopted such a mode as is sometimes done in cases of bankruptcy, so as not to decide it in such a manner as that the parties could not appeal. The Court might have acted upon this principle, and have abstained from doing what they have done, in order that either party might file a bill in equity. We know that the *Chancellor* often does that, refusing to decide upon any judgment of his own, but giving leave to file a bill, in order that if he be wrong he maybe set right by a Court of Appeal. With respect to the word "*petition*", which is mentioned over and over again in the cases, I think it means, not petitions in equity, but such petitions as are frequently mentioned in all acts of parliament. The question

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of jurisdiction was said to turn on this, whether this be a common law proceeding in a Common Law Court, or an equitable proceeding in a Court of Equity. In one case it is said we have no jurisdiction, because if it be a common law proceeding it is not the subject of appeal to this House; on the other hand it is said to be a proceeding in equity, in respect of which, by the modern law, the party has a right of appeal to this House. Upon the whole, it is an extremely important question, as this House is certainly not to assume jurisdiction where it has it not; but at the same time it is bound not to omit exercising a jurisdiction which it in fact has. Upon that subject, therefore, I would recommend time to be taken, in order to consider this preliminary point, which has nothing at all to do with the merits of the question upon which this order has been pronounced, and which is the real object of the appeal.

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Judgment postponed.

The question was a second time argued by *Fonblanque* and *Shadwell* for the Appellants, and by the *Attorney-General* and *Wray* for the Respondent (a), when the case was once more adjourned.

The House being prepared to give judgment,

1824.
 8th April,
 24th May.

Lord REDESDALE this day delivered his opinion as follows :—

(a) The arguments on both occasions are embodied in the former part of this case, for the sake of brevity and convenience.

This case was lately heard before your Lordships, and it involves a question of some consequence in respect of your Lordships' jurisdiction. It is a petition in the nature of an appeal against an order of the Court of *Exchequer*, made in the manner stated, with respect to the disposition of money which has arisen by the sale of estates that were sold under an order of the Court of *Exchequer*, authorized by a particular act of Parliament. Those estates being seized into his Majesty's hands by writs of extent issued to the Sheriff of *Hertford* and *Dorset*, in consequence of considerable debts due from the House of *Boyd, Benfield* and Co. to his Majesty, the act of Parliament to which I have alluded authorized the sale of the estates, to pay the debts due to his Majesty, instead of satisfying those debts out of the growing rents and profits, according to the usual course previously to that act.

My Lords, upon the merits of this case, as to the question with respect to the propriety of the order made by the Court of *Exchequer*, which is the subject-matter of this appeal, I do not propose now to trouble your Lordships, because the first question to be considered is, whether your Lordships can make any order upon this petition which is now before you, regard being had to the circumstances under which it is brought under your Lordships' consideration.

The proceedings, which originated in the Court of *Exchequer*, were writs of extent, issued for the purpose

purpose of obtaining satisfaction of certain debts due to the King. One of these debts was a debt which was found by inquisition (which inquisition operates in the nature of a judgment), and the process to be resorted to for obtaining satisfaction thereupon, is the writ of extent. The other debt was a debt upon bond, taken by the King, on which the like process of extent may issue without any previous inquisition.

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My Lords, the proceedings with respect to these writs were represented to your Lordships as being instituted in a part of the Court of *Exchequer*, which is what is called the Equity side of the Court. My Lords, I apprehend that to have been a total mistake, and that the proceeding was a proceeding at Common Law, although the persons composing the office of the Court from which it issued, in some respects also compose the office of the Court of Equity, and have the charge of its proceedings, so far as the Court of *Exchequer* exercises a jurisdiction in equity. Yet that part of the Court from which the writs of extent issued, is in that particular respect simply and only a Court of Common Law. Now the question which is immediately to be considered by your Lordships is, not whether the persons who have presented this petition of appeal are or are not entitled to any relief against the order complained of, or whether your Lordships have or have not a jurisdiction over the subject-matter of their complaint, and a power of redress; but whether the
 parties

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parties have proceeded in a right manner for the purpose of obtaining your Lordships' judgment upon that subject, or in other words, whether the proceeding itself be not of such a nature, as that if you have a jurisdiction in respect of the subject-matter, you are not precluded from exercising it by the nature of the proceeding as a matter of practice.

My Lords, the original proceedings being by the common process of the Court of *Exchequer*, for the purpose of recovering debts due to the Crown, the first question is, from what side of the Court that process issued. My Lords, it issued from a Court which is a Court of Record at Common Law, constituted for the purpose of the recovery of the King's debts. If so, a process originally issued from the Court of *Exchequer* as a Court of Law, cannot be converted into a process of a different description by means of the exercise of that special authority which is given to it by the act of Parliament to which your Lordships have been referred, prescribing certain summary proceedings for the purpose of effecting sales of estates taken under writs of extent and then applying the monies which are raised by such sale in payment of the debt at once, instead of waiting the slow process of satisfaction by *levari* out of the rents and profits of the estate. That act authorized the Court of *Exchequer*, that is the Court from which the writ of extent issued, to make summary orders upon the subject, and particularly

particularly in respect of the disposal of the surplus, in case there should be a surplus after paying the debt due to the Crown.

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My Lords, in this case there was a surplus, and it is with respect to that surplus that the question intended to be brought under your consideration arises, had it not been for the intervention of this preliminary question, as to your jurisdiction as a Court of Appeal from an order of this nature.

My Lords, a great deal of the argument which has been offered to your Lordships has been, in my humble judgment, wholly beside the question. It has been generally asserted that your Lordships have a universal superintending jurisdiction, and that you are empowered, by way of appeal, to entertain complaints of any failure in the administration of justice in any other jurisdiction. That, to a certain extent, is true, but beyond a certain extent it is not true; because there are many cases in which your Lordships could not entertain jurisdiction, such as those which arise in the *Admiralty* Court, the *Ecclesiastical* Court, the Court of *Chancery* in matters of bankruptcy, and so on. But, my Lords, respecting matters arising in the Court of *Exchequer*, I have no doubt that your Lordships have jurisdiction, if the proper mode be taken for the purpose of calling upon your Lordships to exercise that jurisdiction. Before the act which I have adverted to, and which was made for enabling the Crown to proceed to the sale of estates taken under extents
to

to satisfy debts due to the *King*, the land remained in the hands of the Crown, until by perception of the rents and profits, according to the extended value which was returned by a jury on the execution of the extent, the debt should be paid. With respect to the merits of this case, I may here, by the way, advert to one circumstance. It was perfectly immaterial to the debtor whether the Crown actually received the rents and profits, the Crown having taken the estate into its hands at the valued rate; for whenever the estate, according to that valued rate, should have paid the debt, the debtor was entitled to come into the Court of *Exchequer* and to plead that the debt, by perception of the rents which had been received, was, or *might have been* satisfied, and he would be entitled then to take the estate out of the King's hands, whether the King had or had not received the money; and even although the Sheriff or Receiver, or any other person who might have obtained possession of the estate, had not paid the money to the Crown. He was entitled, on shewing that according to the rate at which the estate had been extended the debt ought to have been paid, to apply to the law branch of the Court of *Exchequer*, the Court of *Revenue* for the purpose of recovering the King's debts, for restoration of the estate to himself by writ of *amoveas manus*. If by any other means than the perception of rents and profits, as, for instance, by the Crown obtaining part payment in the mean time, or if, by any other mode of proceeding, the King's debt had been satisfied out of the debtor's personal effects,

effects, together with a portion of the rents which, according to the extended value, might have been received by the King, he was entitled to plead that circumstance in discharge. He was also entitled, upon any special circumstances that were not within the particular instance I have mentioned, to apply to the King by petition of right; and under the act of King *Henry 8.* which was made for the relief of the subject, he was entitled, on any equity whatever, either to plead that equity, if it could be received in the form of a plea at the Common Law. If it could not be so received, then he was entitled to have the benefit of it by what is called an *English* bill, that is, by an application by petition to the Court, the same Court of *Exchequer*, but not to the same branch of the Court of *Exchequer*, but still to the same Court, with this difference only, that as in the Law Court of the *Exchequer* the Barons are the judges, so, in what is called the Equity side of the Court, the application is to the *Chancellor* and the Barons. But the result would be, that upon such an *English* bill he would be afforded relief, if he should be in a condition to prove, to the satisfaction of the Court, that he was entitled to it.

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My Lords, this jurisdiction of the Court of *Exchequer* is laid down with great clearness by Sir *Edward Coke* in his fourth Institute (a). He describes the Court from which the writ of extent issued, as a Court of Record, constituted for the recovery of the King's debts, as described by

(a) Chap. II. On "The Court of Exchequer."

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one of the most ancient writers upon the subject [*Britton* (a)], who is supposed to have lived about the time of *Edward* the First or Second.—It is rather uncertain at what time he lived, but his work is supposed to have been written in the reign of *Edward* the First. He describes this Court of *Exchequer* as a Court of Common Law and Record, to hear and determine all causes touching the King's debts, (in the old *French*;) “*de choses que touchent leur office a oier et de miner tous les causes que touchent nous dettes.*” Now, my Lords, of this Court of Record as a Court of Common Law, the Barons of the *Exchequer* are the sole judges, as laid down by various authorities. It is certainly true that error in this Court was formerly sometimes examined in Parliament, and sometimes before Commissioners under the Great Seal, previous to a statute made in the 31st *Edw.* 3.; but that statute has provided an intermediate Court of Appeal, so that if there was error in any proceeding in this Court of Revenue, the proper proceeding to remedy that error was by writ of error to the Chancellor and the Treasurer. They are by the statute of 31 *Edw.* 3, directed to take to themselves the Justices and other sage persons, and call before them the Barons to hear informations of the causes of the judgments, and if any error be found they shall direct and amend the roll, and after doing so, send it to the Court of *Exchequer* to have execution thereof. My Lords, that Court also is a Court of Common

(a) Fol. 2. b.—See PRICE'S “Treatise on the Exchequer,” p. 8.
Law,

Law, created by the statute of 31 *Edw. 3.* and from that Court, if there should be error, I have no doubt the proper proceeding would be by appeal to this House, that is, by writ of error in Parliament from that Court, as in other cases; the same kind of jurisdiction being given in respect of errors of the Court of *Exchequer*, by writ of error, which lies first to that Court, and then from that Court to this House.

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My Lords, there is an act of the 5th *Richard 2.* stat. 1. cap. 10, which enacts that the Barons of the *Exchequer* shall have full power to hear every answer of every demand made in the said *Exchequer*, so that every person that is there impeached or impeachable for any cause by himself or by any other person, shall be from henceforth received in the said *Exchequer* to plead, sue, and have his reasonable discharge in this behalf, without tarrying or suing any writ or other commandment whatsoever. Upon this and other statutes and upon these grounds it is, that the Court of *Exchequer*, sitting as a Common Law Court of Record, have jurisdiction in matters which come before them, such as this upon which the orders which are complained of were pronounced.

My Lord Coke, observing upon these statutes (a), and particularly the stat. of 5 *Rich. 2.*, refers to the rolls of parliament, and he states that it was before necessary for the party to have brief

(a) 4th Institute, cap. 11. p. 110.

OR

or letter of the King, under the Great or Privy Seal, to the Treasurer and Barons of the *Exchequer* to do right,—that is, the party sued to the King by petition, on which the King granted his writ or letter to the Treasurer or Barons to do right. Now that depended in a certain degree on the will and pleasure of the King, who was certainly bound to do right; but the act of *Richard 2.* does not leave it in his discretion at all, but gives to the Barons of the *Exchequer* a power to receive pleas and do right. But this was not considered so fully to extend to all matters of Equity as to comprehend such as were of a particular description, and could not come within the compass of pleading at common law. The statute of *Hen. 8.* therefore extended the relief to the subject, by directing that in all cases whatsoever the Barons of the Court of *Exchequer* should give relief according to the equity which might exist between the Crown and the debtor of the Crown. This, wherever the nature of the case admitted of it, might be done by pleading in the common and ordinary course of the Common Law Court of *Exchequer*; but if the circumstances of the case were such as that they did not admit of that simple mode of proceeding, then, as stated by *Lord Coke (a)*, and he refers particularly to a case for the purpose when he himself was *Attorney-General*, *Sir Thomas Cecil's* case, the proceeding was to be by what is called *English bill*, that is by the same sort of proceeding, which in any other Court of

(a) 4th Institute, cap. 13. p. 118.

Equity the subject adopts in complaining of a **wrong** done to him by another subject, when he has no remedy on the form of proceeding at the **Common Law**, and he applies to the Court of **Equity** for the purpose of obtaining relief in equity.

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Now, my Lords, in the present case there can be no doubt that the original proceeding upon which this question arises, was a proceeding by writ of extent for recovery of the debt found in one case by inquisition of the jury, and in the other case of the debt secured by a bond, which is a matter equivalent to a record between the King and the subject. That proceeding was a proceeding at the Common Law. The debts were thereupon seized into the hands of the Crown; and if any circumstance entitled the party to whom this land belonged, to demand that the lands should be taken out of the King's hands and restored to him, and the matter which shewed the right to have the lands taken out of the King's hands could be from the circumstances of the case pleaded in the common forms of the Common Law Courts, I apprehend there can be no doubt that upon that sort of proceeding, the persons who conceive themselves entitled to have the lands so restored to them, would have been enabled to proceed in that way. They would then have obtained the judgment of the Court of *Exchequer*, that they were so entitled or that they were not so entitled. Then if the judgment of the Court of *Exchequer* had been erroneous, the appeal from that court must be by writ of error to the *Exchequer Chamber*, consisting

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ing of the [Lord] *Chancellor*, and the *Treasurer* (or the persons who constitute that office, in consequence of the office of treasurer having been now for a great length of time never granted to any single person,) and upon the judgment of that court a writ of error might also be brought to this House. If the fact had been that all the lands that were taken under the extents in this case had not been sold, but that by a sale of part of them, the King's debt had been satisfied, I apprehend there can be no doubt that according to the returns made to your Lordships by the officers of the Court of *Exchequer*, shewing the proper mode of proceeding in such cases, that the proper mode to obtain the redelivery of lands unsold to the party entitled, would have been by pleading that the debt had been satisfied by the sale of the other lands. That might have been pleaded on the law side of the Court of *Exchequer*, and thereupon a judgment for a writ of *amoveas manus* might have been obtained for the purpose of removing the King's hands from the lands remaining unsold, for the redelivery of those lands and for the purpose of having the possession given up to the party.

My Lords, in the present case, the question (which really is agitated between the King on the one side, and the persons who appear before your Lordships in the character of Appellants on the other,) arises from this circumstance, that the money which had been raised by the sale of the lands that had been seized under the extent was deposited in the Court of *Exchequer*, and was
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laid out in the purchase of stock in consequence of there being incumbrancers upon the estate prior to the debt being due to the Crown, those incumbrancers being entitled to satisfaction of their demand, before the Crown could be paid the debt due to the Crown. In order to investigate the account, and ascertain what was due to those persons respectively, it was necessary to institute certain proceedings in the Court of *Exchequer*, and it must necessarily have been by consent that it was referred to the officer of the Court of *Exchequer* to take the account of what was due to those prior incumbrancers. There was no dispute as to the nature of the several debts: it was necessary only to calculate the amount, and then whatever was due to those persons who had priority was to be satisfied in the first place, before the debt due to the Crown could properly be paid. There were also costs incurred in respect of those proceedings, and the statute which enables the Crown to make sale of estates under these circumstances, provides, that those costs also shall be paid out of the money raised by the sale. It was therefore necessary to have those costs also liquidated, and then when all the prior demands and the costs had been settled, the question arose how the stock that had been purchased with the money raised by the sale of those estates should be applied. Upon that question it appears the Court of *Exchequer* conceived that so much of that stock as had been purchased with the amount of the debt due to the Crown properly belonged to the Crown, and that the residue only belonged to the persons who

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who were entitled to the estates subject to the debts of the Crown. It is contended that that ought not to be the mode in which the Court of *Exchequer* should have disposed of that question, because, it is said, that until all the prior demands were ascertained, the stock which had been purchased remained a fund to which neither party was absolutely entitled, and that when the division came to be made between the persons interested, the value of the stock was to be ascertained at *that* time, and the debt due to the Crown paid by sale of so much of the stock. This question has arisen in consequence of the increased value of the stock between the time of the purchase and the time of the sale.

Now, my Lords, I do not at present interfere with that question at all. I do not mean to propose to your Lordships to give any judgment upon the propriety of that order of the Court of *Exchequer* on the one hand; or of the right which the Appellants in this case suppose they have, to have that order altered and a different disposition made in respect of that stock. The simple question is, can they have the judgment of this House in the form and under the circumstances in which they have sought it? I conceive they cannot, because they do not bring before your Lordships any thing upon which, in my humble opinion, your Lordships can pronounce any judgment. The proceeding as it now stands, is a proceeding in a Court of Common Law. To this House then, there can be no proceeding in the nature of an appeal

appeal but through a writ of error, alleging error
 the judgment of the Court below, and which
 House as a superior Court of Law may then
 lled upon to reform, and then this House must
 ed as a Court of Common Law. The ques-
 ight have been brought before this House
 ling at the Common Law, which it was open
 arties to do, for they might have pleaded
 rt of *Exchequer*, that the debt of the
 ht to be considered as satisfied by sale
 of the stock as was purchased with
 ised by sale of the estate, and that
 ight to belong to them. If that could
 into a proper form by way of plea
 g at Law, then a writ of error would
 ment of the Court of *Exchequer*;
 of Error affirmed what the *Ex-*
 an appeal would lie from that
 of *Exchequer Chamber*—to this
 it is probable that they would
 ely difficult to plead in that
 of Common Law in the *Ex-*
 not without relief. Their
 hen, would have been by
 of an *English* bill to the
 exercising jurisdiction
 ng that in equity they
 ular relief, under the
 3.; as was done in the
 Sir *Thomas Cecil's*
 n from the compli-
 n relief by plead-
 e, as Sir *Edward*
 Coke

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Coke states, applied by *English* bill for that relief which he conceived himself entitled to, and the Court of *Exchequer* on *English* bill gave him that relief.

Your Lordships have heard observations from the bar with respect to that proceeding, and the manner in which it appears to have been pursued in the records of the Court of *Exchequer*: and it is said that although Sir *Edward Coke*, in his report of the case, calls it a proceeding by *English* bill; it was not a proceeding by *English* bill, but by *Petition*. It is somewhat extraordinary, that Sir *Edward Coke*, who was *Attorney-General* and a party in that case, should be conceived to be ignorant of the nature of the proceeding to which he refers; but I apprehend it was certainly what is commonly called a proceeding by *English* bill, which is nothing more than a petition in *English* instead of a plea in *Latin*, that petition admitting of a more ample statement of circumstances, and a less technical mode of proceeding than the proceeding at the Common Law. Whether any formal answer was put in by Sir *Edward Coke* as *Attorney-General* does not appear, but I apprehend there can be no doubt that that was a proceeding by *English* bill as stated by Sir *Edward Coke*, and I can have no doubt therefore that in this case, if the persons who conceive themselves aggrieved by the order which has been pronounced in the Court of *Exchequer*, shall think fit by *English* bill to state the circumstances by which they conceive they are entitled to have a different

different order pronounced, that the Court of *Exchequer*, sitting as a Court of Equity, will then pronounce such order as they ought to pronounce. Whether they will pronounce a different order or not, is another question: that depends upon their judgment as a Court of Equity; but from that judgment a petition of appeal may be immediately presented to this House, because the act which constitutes the intermediate court does not apply to a proceeding by *English* bill.

Upon these grounds, therefore, I submit to your Lordships that the present proceeding cannot be entertained by your Lordships, consistently with that rule and order of proceeding which guide this House as a Court of Appeal from Courts of Common Law and from Courts of Equity. Where the application to your Lordships is directly from a Court of Common Law, there your Lordships adjudge according to the Common Law: where the application to your Lordships is directly from a Court of Equity, there your Lordships adjudge according to the principles and rules of the Courts of Equity. Under these impressions I would submit to your Lordships, if you think proper, that your Lordships should declare that you are of opinion that the petition of appeal now presented to you is not the proper mode of proceeding for the purpose of obtaining the judgment of this House on the rights of the petitioners; and therefore your order must be that the petition should be dismissed. That order may be pronounced without prejudice to any other proceedings

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ings that the petitioners may be advised to take for the purpose of obtaining relief from the order complained of, in case such order is in any manner injurious to the interests of the petitioners; and in case the petitioners shall not otherwise obtain that relief which they may be advised they have yet a right to seek.

The *Lord Chancellor* having put the usual question; it was

Ordered—That the petition
be dismissed.

OBSERVATIONS

ON THE PRECEDING CASE.

THE question raised in the foregoing case, is undoubtedly one of the first importance, as involving matters worthy of very serious consideration.

Notwithstanding the very learned and able argument of the counsel for the Appellants, it may be with deference suggested, that there yet remains a topic bearing materially on the point under discussion, which does not appear to have been brought under the notice of the House of Lords. That is, the nature of the prerogative proceedings under the Crown process, now called
Extent,

Extent, with reference to the constitution of the Court of *Exchequer*, and the *inherent* EQUITABLE jurisdiction of the Barons who have authority, and are required in all cases to interpose on behalf of the *Subject*, as prescribed in their oath (a) (which is in this respect distinguishable from that of the judges, and correspondent with that of the *Lord Chancellor*):—that “right they shall do to all people, as well to poor as to rich.” It is within *this* jurisdiction of the Court of *Exchequer* to make *equitable* orders in any stage of such a proceeding whilst pending or when at an end, between the King and the Subject, which the equity of the case may in the consideration of the Barons appear to require; and that not only by the statutes of 5 *Rich.* 2. and 33 *Hen.* 8. (b), but (in the language of their own records, as far back as the reign of *Edward* 2.) “*de EQUITATE Curia.*” (c) The strong measure of proceeding on the part of the Crown by the prerogative process of extent was ever thus controllable throughout in all its stages, upon summary application by this *equity* of the Court. The Barons are bound in the first instance by their judicial duty to “serve the King,” and “*his right*” “not to disturb nor respite,” and “his business to speed before all other.” (d) Their *secondary* duty is to protect *the Subject’s* equities, moderating by that constitutional quality of their mixed jurisdiction, the very peremptory and almost arbitrary power with which they are armed, for enforcing

(a) PRICE’s “Treatise on the Exchequer,” p. 48.

(b) *Ib.* 33.

(c) *Ib.* 260.

(d) *Ib.* 48.

the *speedy* and summary render of the King's prerogative rights. For this reason, the duties of the King's Ministers in his Court of *Exchequer* have been well described in a book as old as the reign of *Hen. 2.*, to have for object "*ut Regis utilitati prospiciant,*" qualified by the condition, "*salvâ tamen Equitate.*" (a) The jurisdiction in equity of the Court of *Exchequer*, it should be observed, must necessarily, as between the Crown and the subject, be always exercised as *against* the King, who can have no equities there; even his equitable demands being all treated as matter of *right* in that Court which was purposely erected for the establishment, protection, and recovery of the rights of the Crown.

The proceeding by extent, when it is as in this case it was, in the nature of *mesne* process, is in its inception in form an equitable proceeding. It is founded on a commission to inform, and an inquisition thereon, which is executed *ex parte*. When a seizure is made under an extent or under any Crown process, the property of the debtor then in the hands of the Sheriff is merely *in deposito*, subject on the one hand to the legal claims and rightful demands of the Crown, and on the other at the same time not only to the claims of the party, but to *all* the *equities* of *any of the King's subjects*; and between the conflicting claims of right on the one hand, and equity on the other, it is the duty of the Court of *Exchequer* to decide,

(a) Dial. de Scaec.—*Vide* PRICE'S "Treatise on the Exchequer," Introductory Chap. p. 16.

and that they may do on many occasions by interlocutory order on motion.

If the order which was made in the matter in dispute on this intended appeal had been an order made on the application of the Appellants, as if they and not the Crown had applied, the question now raised would have been the same in principle, though very different in form and object, and the arguments pressed for the Appellants in this case, might in that case have been more forcibly directed and more strongly applied. Thus if the assignees had, on a summary application, prayed the Court to declare that they were entitled to the dividends and accumulations up to the time of the order, and the Court, instead of doing so, had decided against them on that application, upon the principle of the present disputed order (one of the members of the Court then differing from the rest as now), the question of the right to appeal would, on all the grounds relied upon in the arguments on *either* side, have been at least much more difficult to determine, particularly in the negative. The great question of whether *that* would have been an independent equitable order in form and substance, would have assumed a position much more favourable to the arguments of the present Appellants—"that the order was an order of the majority of a Court having jurisdiction to dispose, *from time to time*, by *equitable* proceedings, upon equitable principles, of a fund got into its possession by *legal* process, and being for such purposes a Court of Equity, acting as such by a summary mode,

mode, making an independent order without reference to any cause either pending or disposed of."

The Court of *Exchequer* as a Court of Revenue adjudicating between the Crown and Subjects, is not, properly speaking, either a Court of Law or a Court of Equity, considered as distinct from each other. It is a Court of Law invested with an attempering equitable jurisdiction, to restrain and regulate the law, as administered by the Barons, according to the equity of each particular case; or rather a Court of Revenue, armed with power to proceed by legal means, and tempered with a jurisdiction to act according to equitable discretion. It acts concurrently as a Court of Law and of Equity, at times calling in the aid of its power to proceed by legal means even in matters of equity, and at other times pronouncing summarily on motion, collateral equitable orders, in matters originally in form and substance the subject of legal proceedings: and frequently uniting and blending both, in a manner unknown to the other Courts, it will act as occasion may require, alternately as a Court of Equity or of Law in the course of the same proceeding. Thus it involves in legal suits third persons, in respect of their legal liabilities, not being parties to the original proceeding already instituted and proceeded with; dismissing original parties on some equity shewn in the course of the cause (a), and acting at the same

(a) *Vide* PRICE'S "Treatise on the Exchequer," B. I. ch. 10. 13 and 14, *passim*.

time and in the same matter at once "*secundum
rem et consuetudinem Angliæ*," and "*secundum
iurum et bonum*."

ch collateral orders, so made, are warranted
merous precedents extant in the order-books
Court. Two have been previously adduced
e *King's Remembrancer's* side or office
Court. The following instance from the
he *Treasurer's Remembrancer's Office* in
is however much stronger than either
In the case now referred to, a motion
r counsel on the part of the purchaser
h had been the property of a Crown-
ed, and had been seized for the debt
under an extent. The application
n affidavits stating that more lands
for the same and which belonged
whose husband had some time
hem; and that timber, which
from the freehold before the
on, remaining felled upon the
seized by the Under-sheriff
e said writ and inquisition
ing *Counsel for the Crown*,
said timber should be deli-
applicant (a).

There

rer's Remembrancer, T. T.
Treatise on the Exchequer,"

ion) for quieting the tenants
Crown, possession of lands
and for respiting further
process

There are many proceedings in the *Exchequer* which are wholly of an amphibious nature, and it would be difficult to say whether they were at law or in equity. Such are the *petitions* to the Court, in the case of Sir *Thomas Wroth* (a), in Sir *H. Nevil's* case (b), and in the Banker's case (c).

These were treated and disposed of as if they were proceedings at law. In Sir *Thomas Cecil's* case, the proceeding by whatever name it was called, whether bill or petition, was in the nature of a suit in equity.

There is no such "side of the *Exchequer*" as what is sometimes termed *the equity side*. The equity of the *Exchequer* pervades the whole court, and was constantly exercised even on what is called the plea side *in matters between the Crown and the subject*, and that by petition to the Barons. Such proceeding by Petition was the most general course of proceeding before the Barons on the part of the Subject, for the purpose of bringing under the consideration of the Court, matters of defence against charges in respect of which, they were "sued, vexed, or troubled," till the statutes authorizing traverses and equitable pleas.

It should be kept in mind that it is for the sake of *expediting questions which would otherwise delay the Crown's rights*, that the *Exchequer* pro-

cess issued against the same lands by another Plaintiff in another suit at law. *Lib. Ord. Ex-parte* T. R. M. T. I. Ann.

(a) Plowd. 452.

(b) Ib. 377.

(c) 11 State Trials.

ceeds

ceeds as the Court of Augmentations did in equity by *summary decrees*, or “in a summary way according to their discretions.” (a)

Much fallacious reasoning has been founded in some cases upon a distinction taken between the different branches of the Court of *Exchequer*, as being under the authority of different judicial officers, and having several jurisdictions according as the sitting Court is composed of all, or of some or others of those. Thus the following distinctions have been made (b),—“The *Exchequer*, comprehending that great college of the revenue, made up of all the officers of the upper and lower *Exchequer*,”—“The jurisdiction of the *Exchequer Chamber* before the Lord Treasurer and Chancellor,”—“The Court of *Equity* before the Treasurer, Chancellor, and Barons,”—“The Authority of the Court of *Pleas* holden before the Barons.” In this division and distribution of the general jurisdiction of the *Exchequer*, (admitting there be any such) it appears to be entirely overlooked, that for many reigns the entire revenue jurisdiction of the Court has devolved on, and been exercised by the Barons alone. And wherever the presence of the other great officers of the Court, whose actual attendance was formerly necessary, to give sanction to such acts of the Court as required the weight of their authority, they either attended in

(a) Banker's case, State Trials, Vol. XI. p. 158, col. 2.

(b) Ib. p. 146, col. 2. fol. 2d Edit.—or in *Howell's Edit.* Vol. XIV. p. 99.

person or the matter was postponed till they should be able to attend (a). On all such occasions in modern times, the Barons act alone throughout, and where the accession of the personal authority of the Treasurer, or Chancellor and Under-treasurer would formerly have been necessary, they are now supposed to be present, and assenting to the judgment of the Court.

The argument founded on the equitable authority given to the Court of *Exchequer*, by the act of 25 Geo. 3. c. 35. has been strongly put in this case; but if that statute had not given the *Exchequer* the power thereby conferred upon it, to act as prescribed, it might have so acted by virtue of its Common Law jurisdiction, to give the subject the benefit of equity in a clear case on summary application. That jurisdiction has been recognized by the Courts. It has been determined that statutes which give parties a right to apply in a summary manner for equitable relief to the Court of *Chancery*, authorize the same application to the Court of *Exchequer*.

It was asked by Lord *Redesdale*, in the course of the argument, how the Court proceeded before the statute of *Elizabeth*, when the old course was in practice. On that subject, the following extract from an old manuscript book on the practice of the *Exchequer* gives an explicit account.

(a) See an instance of this in the *Exchequer of Pleas* in PAIRCE'S "Treatise on the *Exchequer*," Vol. I. p. 267, (*in nota ad fin.*)

"When

“ When lands and goods are extended and
 “ seized into the King’s hands they are charged
 “ upon record, and they cannot be discharged but
 “ by record, and a judgment of *amoveas manus*,
 “ although the whole penalty of the bond or re-
 “ cognizance, or other debt, be paid by seizure of
 “ lands, or otherwise; in which case it must ap-
 “ pear *by pleading* how the debt is satisfied, for
 “ until a judgment of *amoveas manus*, the King is
 “ in possession of the lands.”

But that appears to have been a course which must have obtained after the statute of *Henry* the Eighth; and it leaves the question open as to the mode of proceeding in cases where there should be nothing to plead to. In such cases the old remedy by *petition* to the Barons, or the more modern mode of summary application *by motion*, (a convenient modification of the course by *petition*) must still be necessarily resorted to.

The distinction appears to be, that where the subject seeks to establish an equitable claim against the Crown, by setting up an original right, legal or equitable, unconnected with any demand made by the Crown, the course of proceeding should be by *bill*, or *petition* in the nature of a *bill in equity*, or in the nature of a *petition of right* (a). Where on the other hand, the subject’s equitable right is to be set up *in answer* to a demand on the part of

(a) See PRICE’S “Treatise on the Exchequer,” Ch. 15. *ad fin.*
 —Et Vide the case of the Banker’s, 14 How. State Trials, p. 83.

the King, the course was by petition *in the nature of plea*. Even at this day equitable *pleas* assume the form and stile of *petition* : and the now very usual and ordinary mode of applying by motion, is in effect but a more summary manner of petitioning the Barons for the benefit of that equitable protection, which by the constitution of the Court, they have jurisdiction to give to the subject against the legal demands of the Crown.

The argument of the Appellant's counsel bottomed on the nature of the proceeding by petition, as being a *summary* mode of obtaining *equitable* relief against the Crown, in cases where the Crown is actor and the Subject *quasi* Defendant, is one which deserves great consideration, perhaps more than it has received. It was indeed answered by reference to the case of *Sir Thomas Cecil*, and the cases of *Ex parte Colebrooke*, and *Colebrooke v. The Attorney-General*. In the case *Ex parte Colebrooke*, however, it should be observed, that one of the Barons (of great experience and learning as an *Exchequer* lawyer)—Mr. Baron *Graham*,—expressed very serious doubts, whether in that case,—which was not a matter wherein the petitioner set up a right against the Crown, but merely complained of a refusal on the part of the Commissioners of the Audit Board, to make him, as a public Accountant, just allowances—the remedy was not *rather* by the summary mode of petition than the more formal proceeding by bill (a).

(a) *Craufurd v. The Attorney-General*, 7 PRICE'S *Exchequer* Rep. pp. 81, 82.—*Ex parte Colebrooke*, *ibid.* pp. 130, 131.

The reasoning of the learned Baron will be found to be conformable with the nature of the jurisdiction of the Court, and the principles of proceeding in the general practice of the *Exchequer*, upon which the Barons have ever acted as between the Crown and the subject. All the statutes passed for amending or altering that practice, have had for object the dispensing with delay, and the advancement and expedition of the determination of the *King's* suits. It will hardly be considered that this object was meant to be confined to the Crown, and not to be extended to the subject, particularly as the proceeding on the part of the latter by summary application on petition, and even by motion, is according to the ancient practice of the Court, whilst the proceeding by *bill in equity* against the *Attorney-General* is comparatively of modern date, and was probably introduced after the passing of the statutes of the 13th and 27th of *Elizabeth*.

The anomalous power of the Court of *Exchequer* (founded on its general equitable jurisdiction) which it often exercises in the most summary manner, particularly on the Lord Treasurer's Remembrancer's side of the Court, of proceeding by *injunction*, without bill filed, or other proceeding in equity instituted, to stay proceedings &c. in cases of ordinary application by motion, may be illustrated by instances familiar in practice. Thus the Barons are constantly called on so to interfere in the course of matters pending before them,

as in the reference of bills for taxation, and in removing proceedings against privileged persons, or in any other matter wherein a stay of proceedings is necessary; and this is a further proof of the extraordinary authority of the Court to interpose under its equitable jurisdiction, in restraining and directing proceedings unconnected with equitable matters, and apparently not controllable by equitable means. Lord Chief Baron [Eyre] in delivering the judgment of the Court in the case of *Cawthorne v. Campbell* and others (a), speaking of the course by which the Court asserts and protects the privileges of its officers to be sued in the Exchequer and not elsewhere—that is *by injunction*—is made to say, “The course and received practice has been to exert the jurisdiction in the shape of an injunction; and surely it is not a very extraordinary thing, that a jurisdiction so anomalous as the jurisdiction of the Court of Revenue in the Exchequer is, should have adopted the course of a Court of Equity in asserting its jurisdiction, rather than that of the Courts of Law, and should therefore rather proceed by injunction than by plea.”

On the whole, it may perhaps be respectfully suggested that the arguments urged in the preceding case may yet be carried even further, with reference to the jurisdiction of the Exchequer, than it was thought necessary, to press them in the House of Lords.

(a) Anstr. 208.

PLEA.

THE Plaintiff filed the present Bill against the Defendants, praying that he might be declared entitled to all the great tithes arising &c. upon the lands in the occupation of two of the three Defendants, and that the Defendants in possession might be decreed to account &c.

The Bill, after stating the Plaintiff's title to the great and rectorial tithes in kind arising out of lands within the rectory and parish of *Mildenhall, Suffolk*, called *The Old Inclosures and Inclosed Grounds of Beck Row and Holywell Row*, the property of divers persons, a small part of which were the property of one of the Defendants, and averring occupation by the others, set out a local act of parliament, passed 47 Geo. 3. for inclosing lands in *Mildenhall*, by which (after reciting that the Plaintiff and other persons were entitled to certain portions of tithes of divers other lands in the said parish) three Commissioners were to be appointed for carrying the act into execution, empowered to hear disputes &c. but they were not authorized to determine the title to lands or tithes—that they were authorized to set out and allot to the impropiator and vicar and other persons in lieu of tithes, so much of the lands to be inclosed as should be equal to two-eleventh parts of all the open field,

answer, with liberty to Plaintiff to except—not being a short answer to the demand, bringing the question between the parties to a single point precisely meeting the allegations in the bill.

To part of a bill praying an account of the great tithes arising out of certain lands called the *Old Inclosures*, in the occupation of the Defendants, a PLEA—setting forth an inclosure act and an award of Commissioners under it, wherein they had allotted certain parts of the inclosed land in lieu of the right to tithes in kind in various persons and in lieu of and as a compensation for all tithes due to the Plaintiff (after having noticed a dispute between a claimant of the tithes of certain *Old Inclosures* as against the Plaintiff, which they had declined to determine) and averring that the lands in the occupation of the Defendants were not part of the *Old Inclosures* so in dispute—overruled, and ordered to stand for an

arable lands, and one-seventh part of all the old inclosed lands (save and except such lands as were formerly part of *Mildenhall Common*, inclosed under the 15th Ch. 2.) and to one-ninth part of all the lands and grounds in *Mildenhall*, subject to the payment of all tithes in kind, and also equal in value to such moduses &c. in lieu of tithes remaining after the roads and allotments should be set out—that they were further authorized to subdivide the allotments to be made to the impropriator and vicar, and the other persons entitled to tithes, between them.

The Bill then stated that the Commissioners made an award, but that they did not thereby make any allotment to the Plaintiff in lieu of the tithes due to him on account of the said old inclosed lands at *Holywell Row*, belonging to one of the Defendants, who refused to redeem and exonerate the same tithes under the said act; and that such allotment as was made by the said award to the Plaintiff for tithes, was made to him on account of the Plaintiff's title to tithes in other lands within the same parish of *Mildenhall*, and within the Plaintiff's tithe district of *Beck* and *Holywell Row*, than those belonging to the said Defendants in the following terms:—"And we the
" said Commissioners do hereby assign, set out
" and allot unto and for *William Webb* the
" younger, in lieu of and as a compensation for all
" tithes due unto *F. Wing*, which allotment has
" been purchased by the said *William Webb*,
" one piece or parcel of land &c. in *Beck Row* field,
" bounded &c. containing &c.

The

The bill concluded with various necessary averments and corresponding charges and interrogatories founded upon the preceding statements.

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V.
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and Others.

The Defendants put in the following

Plea—as to all *the discovery and relief* sought by the Bill, except to so much as seeks (&c.) [to inquire of the existence and of part of the contents of the act of parliament, and of the making of the award by the Commissioners, and its contents as stated in the Bill.] The plea then averred the passing of the act—setting it out as in Bill.

And for further plea, the Defendants say that the Commissioners appointed by the said hereinbefore stated act of parliament, duly made their award in writing under the same, bearing date &c. and thereby, after reciting or mentioning a certain act of parliament passed in the 41st year &c. (Geo. 3. entitled &c.) and after setting out roads and making certain allotments and allotting unto the vicar of *Mildenhall* certain pieces of land in lieu of his right of common, the Commissioners did thereby assign and allot unto and for Sir *Charles Bunbury*, Bart. in lieu of and as a compensation for all the tithes arising &c. within *Mildenhall*, and due to Sir *Charles Bunbury*, certain pieces of land &c. “And the said Commissioners thereby declared as follows, that is to say, And whereas the said Sir *T. C. Bunbury* did deliver a statement in writing to us the said Commissioners, wherein he claimed the following old inclosures, viz. &c. expressed by numbers—

WING
 vs.
MILTON
 and Others.

bers—in ad 13—as free from all great tithes;
 “ And whereas the hereinafter named *Frederick*
 “ *Wing* did deliver a statement in writing to us
 “ claiming great tithes of the old inclosures as in-
 “ propriator. And whereas we did hear the evi-
 “ dence produced by the said Sir *T. C. Bunbury*
 “ and *F. Wing* respectively, in support of their said
 “ claims, but not being empowered by the said
 “ act to determine the same, we do hereby declare
 “ that the said old inclosures are not exonerated
 “ by us from the payment of great tithes, but only
 “ from the payment of vicarial small tithes. And
 “ the said Commissioners by their said award after
 “ directing the allotments thereby made to the
 “ said Sir *T. C. Bunbury*, to be (inclosed) and
 “ fenced as therein mentioned, did thereby make
 “ certain allotments to the Rev. *Thomas Creeke*,
 “ Clerk, as vicar of the said parish of *Mildenhall*,
 “ in lieu of tithes in manner and form (and in the
 “ words and figures following, that is to say, And
 “ we the said Commissioners do hereby assign,
 “ set out, and allot unto and for the Rev. *Thomas*
 “ *Creeke* as vicar of *Mildenhall*, in lieu of and as a
 “ compensation for all tithes, modures, composi-
 “ tions, and other payments in lieu of tithes
 “ and all ecclesiastical dues and payments what-
 “ soever (except *Easter* offerings, mortuaries, and
 “ surplice fees) due unto the said vicar, except of
 “ such old inclosures, warrens, and other lands
 “ within the said parish as are not discharged
 “ from tithes under the aforesaid title recited as,
 “ and which are particularly set forth in the sche-
 “ dule hereto annexed, all those pieces or parcels
 “ of ground (as described) And after the
 “ said


 OF THE
 MUSEUM
 AND GALLERY

said award describing the pieces or parcels of
 ground so allotted unto and for the said Rev.
Thomas Creeke, in lieu of tithes, they did there-
 by make certain allotments to *William Webb* the
 younger, in lieu of all tithes due unto the said
 Plaintiff, and in manner and form and in the words
 and figures following, that is to say, "And we the
 said Commissioners do hereby assign, set out, and
 allot unto and for *William Webb* the younger, in
 lieu of and as a compensation for all tithes due unto
Frederick Wing," meaning thereby the Plaintiff,
 which allotment has been purchased by the said
William Webb the younger, of the said *Frederick*
Wing, "one piece or parcel of land or ground,
 situate in *Beck Row* field, containing 13 acres,
 and a road, 14 and a half perches, bounded on
 the north-east by an allotment to *Ann*
Wing and *Frederick Wing*, on the south-east
 by an allotment to the said *William Webb* the
 younger, purchased of the said *Frederick Wing*,
 on the south-west by the private road, No. 26,
 and on the north-west and remaining part of the
 north-east by an allotment hereinafter allotted to
Charles Morley the younger." And the said
 Commissioners annexed to the said award a memo-
 randum in writing as part of their said award,
 and such memorandum is in the words and figures
 following, (that is to say) "Memorandum, We
 the said Commissioners do hereby declare, that
 at the time of and previously to executing our said
 award, *Frederick Wing*, of *Bury St. Edmund's*, in
 the county of *Suffolk*, gentleman, came before us
 and required us to take notice, that the allotments
 of land made to *William Webb*, alleging, that al-
 though

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 v.
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 and Others.

“ though the said *William Webb* did in or about the
 “ month of *July*, 1810, enter into a contract with
 “ the said *Frederick Wing* for the purchase of the
 “ said allotments of land at or for the price or sum of
 “ 2856*l.*—and although we the said Commissioners
 “ were requested as well by the said *Frederick Wing*
 “ as by the said *William Webb*, to allot the same to
 “ the said *William Webb* accordingly,—yet that the
 “ said purchase was never completed, nor any part of
 “ the purchase-money paid.” And the said Commis-
 sioners also annexed a Schedule in writing to their
 said award, as part of their said award, and such
 schedule is headed and entitled in manner and
 form, and in the words and figures following, that
 is to say, “ Schedule of the old Inclosures, Warrens;
 “ and other Lands within the said parish, and not
 “ discharged from tithes, referred to in our award
 “ to which this is annexed,” as by the said award
 to which Defendants for greater certainty: case
 leave to refer, when produced will appear.

The Plea concluded with the following aver-
 ment, “ That the several closes, pieces or parcels
 “ of land, in and by the said bill of complaint
 “ alleged to have been in the occupation of De-
 “ fendants, *John Murrells* and *William Goss*,
 “ from *Michaelmas*, 1817, as tenants to Defendant
 “ *P. T. Case* are not, nor are, or is, any or either
 “ of them, or any part thereof, or of any of them
 “ the 13 old Inclosures, or any of the 13 old inclo-
 “ sures which are mentioned in the said award,
 “ and therein numbered, &c. as aforesaid, or
 “ any part of such inclosures; or any of them,
 “ all which &c. and therefore they do plead the
 “ same

"same in bar to so much and such parts of the
"Plaintiff's said Bill as" &c.

1823.
WING;
v.
MURRELLS,
and Others.

"*Martin, Lovat and Eagle*, in support of the plea, submitted, that the matters averred amounting to an extinguishment of the Plaintiff's demand, furnished a good plea in bar to such parts of the Bill as had been pleaded to, and formed a short answer to the right set up, and was therefore properly the subject of a plea in bar of the claim made by the suit. They relied much on the circumstance that this was a Bill by a portionist for a part of the tithes, urging that the question between the parties would turn on the true construction of the award—being in effect whether the allotment was given in lieu of the tithes which formed the subject-matter of the present demand, and that would be put in issue shortly by replying to the plea, and if affirmed it would be a good bar.

Jervis, on the other hand, contended that the Bill required an answer, and that the plea which had been put in could not be supported as a bar to the Plaintiff's demand, and for the purpose of establishing that proposition very particularly collated the averments in the bill with those of the plea, insisting that it was not competent to the Defendants to get rid of the suit by so short a mode, in consideration of the facts stated in the plea.

RICHARDS, Lord Chief Baron.—The facts averred by the plea are too complicated to enable the Defendants to protect themselves from answering
by

1823.
WIFE
MURKIN
and Others.

by stating them by way of Plea. I think it is impossible to say that they furnish that kind of short answer which, according to the practice of Courts of Equity, is permitted to be made the subject-matter of Plea. The Defendants, therefore, are not in a condition to avail themselves of that form of proceeding. The Plea must therefore be overruled. It may however stand for an answer, with liberty for the Plaintiff to except in the usual course.

Plea overruled.

In the Matter of the Recognizance of THOMAS CLARK, and his Pledges.

THE recognizance in this case, the Principal 40^l, the pledges 20^l each, was conditioned that the Principal should appear personally at the General Sessions of the Peace for the City of London, to answer to a charge of misdemeanor, intending to steal from the person of the Prosecutor.

The party (Clark) not appearing, the recognizance, being forfeited, was estreated in the ordinary course into this Court.

Sir W. Owen now applied, on behalf of all the parties, that the Recognizance might be discharged upon producing the constable from the De-

Under circumstances, the Court refused not only to discharge the recognizance of three persons bound for the appearance of one of them, the principal, at the Quarter Sessions, to answer a charge of misdemeanor, but even to respite it generally till further order.

They also refused to respite Process for a longer time than till the following Term, considering it a case for suspending process from term to term only.

WOMAN

puty

puty Clerk of the Estreats, and the certificate of the Clerk of the Peace, stating the condition of the Recognizance as above.

1823
In re THOMAS
CLARK. JA

The affidavit made by *Clark* himself, and another person, *Alfred Knight*, in support of the motion, stated that, at the time of the examination of *Clark* upon the said charge, the *Prosecutor* of the indictment swore that he resided at No. 71, *Newgate Street*, in the City of *London*, and that immediately upon the said indictment being found, he (*Clark*) made inquiry at 71, *Newgate Street*, for the purpose of serving him personally with notice of trial, in order that *Deponent Clark* might take his trial at the then next Sessions, and get rid of the indictment, but that he found that the *Prosecutor* did not reside there at that time; that, after much exertion, he found out the other *Deponent*, *Alfred Knight*, and the latter *Deponent* stated that, from certain letters received from the *Prosecutor*, he (*Knight*) was certain that the *Prosecutor* was then (at the time of making the affidavit) in *South Wales*.

Under these circumstances, the present motion was now made, after several previous applications, for the same purpose of discharging the *Estreat*.

Per Curiam,

This is certainly not a case which calls upon the Court to discharge the *Estreat* of this Recognizance.

GARROW,

1828.

IN RE THOMAS
CLARK.

GARROW, *Baron*. We may, however, do what we before did, in the case of a party who was shewn to have gone to *America*, which we consider to be a good precedent;—that is, respite our process from time to time, in order to give the parties an opportunity of finding the Prosecutor in the interval.

Sir W. Owen then prayed a year; but

The Court would only permit it from Term to Term. And they then made the following

Order, that Process for levying the amount, be respited till the last day of *Easter Term*.

1823.

Friday,
31st January.

Practice
[In Equity.]

Exceptions to the Master's Certificate, on reference of an answer for impertinence, may not be filed as of course in this Court.

A previous application must be made to the Court for leave to file Exceptions.

THORNTON V. PELLATT.

MOTION for leave to file Exceptions to the Master's Certificate upon a reference of an answer for impertinence.

The Lord Chief Baron expressed some surprise at the application for leave to do what he considered was of course; and being told that it was considered necessary, by the practice of this Court, to obtain leave to except, his Lordship referred for information to the officer of the Court, who stated that it was the practice to apply for leave in the first instance.

Thereupon

Thereupon the Court granted the motion (a).

Ordered.

1823.

THOMSON

PELLATT.

(a) *Vide Eyton v. Dicken, ante*, Vol. IV. p. 303, where it was reported to be the practice in *this* Court, if a Purchaser should be dissatisfied with the Deputy Remembrancer's *Report of title*, the course is to apply to the Court for leave to file Exceptions thereto.

Chief Baron THOMSON used to take a distinction between the Report of a Master and his Certificate; observing that a *report* might be excepted to as of course, but that leave must be obtained for filing Exceptions to the Master's *Certificate*.

PHILLIPS V. STEPHENSON.

THIS was a motion that the Defendant might, *without prejudice to Exceptions being taken to the several answers put in in this cause*, leave, with his clerk in Court, within a week, all receipts, vouchers, and books of account, relating to the matters in question in this suit, with liberty for the Plaintiff to inspect them in person.

Where the effect of a motion would be to waive Exceptions to Answer, the Court will not qualify their order by making it without prejudice to exceptions being taken.

Query.

Whether a motion for production of papers, &c., operates as a waiver of the Plaintiff's right to except?

It was stated that the present application was made so qualified; because it was considered to be doubtful whether the motion, if made in the ordinary

nary

1823.

PHILLIPS

STEPHENSON.

nary terms, would not operate as a waiver of the Plaintiff's right to except to the answers, but

The Court said that they would not enter prematurely into that question; and that the Plaintiff must abide by the consequence of his motion as matter of practice, observing that they could not, by introducing terms into an ordinary application, protect the party from any practical result. They therefore made the

Order, as to all the receipts &c. admitted by the answer to be in the Defendant's possession, in the usual terms, directing it to be entered on the minute, that the Court make no order as to the application being granted without prejudice.

1823.

Friday,
7th February.

Rule for staying proceedings on an assignment of a bail bond, which had been obtained upon the application of one of the bail, stating by affidavit an engagement between himself and the Plaintiff to

SWEETING V. WEAVER.

SIR William Owen had obtained a Rule on the part of the Defendant's bail, calling on the Plaintiff to shew cause why the assignment of the bail bond in this case, and all proceedings had thereon, should not be set aside, "being contrary to good faith."

The affidavit of the applicant, who was one of the bail, stated that he had obtained the assignment of the bail bond from the Plaintiff, on payment of a sum of money at a future day, on the ground of a breach of good faith in proceeding against him before the time, notwithstanding the agreement discharged with costs, upon a distinct denial (by affidavit) of the making the agreement as stated.

the

the Defendant's bail, stated that he had made an agreement with the Plaintiff to pay him a sum of money within a stipulated time, to be discharged from his obligation, on the faith of which, and relying on no proceedings being taken against him, he did not procure special bail to be put in; and that, in the meanwhile, and before the expiration of the time agreed on for payment of the money, the Plaintiff proceeded against him on an assignment of the bail bond.

1823,
SWEETING
&
WEAVER.

Jervis showed cause on an affidavit denying the breach of good faith alleged, and negating the facts in the affidavit made in support of that ground of the motion.

He further urged against the application the intervening delay, the writs having been served on the 28th of *November* last, and declarations delivered on the 1st of *December*, indorsed "to plead" "within the first four days of this Term," submitting that notice of this application should have been given immediately, and the motion made earlier (a).

He also contended that, as the Defendants in the action on the bond had entered an appearance on the 4th of *December*, it was a waiver of any assumed irregularity (b).

The Court held that they were, in such a case

(a) 1 Cowp. 14. (b) 1b. 129.

1823.

SWESTING
vs.
WAGNER.

as this, bound by the positive affidavit made in answer to the application denying the engagement, and that, in discharging the rule, it must be with costs.

Rule discharged with Costs.

1823.

Wednesday,
29th January,
12th February.

New Trial.

Where trespass is brought which involves a question of the right to land, although evidence of acts of ownership, &c. be given on both sides, if the Judge who tried the cause should consider that the testimony on either side preponderates, and so direct the jury, the opposite party is not bound by the verdict, and the Court will grant a new trial.

The Court will not, on motion for a rule for a new trial in such a case, suffer affidavits to be read, imputing improper motives to the jury in finding their verdict.

Ownership of land adjoining either side of a road, *prima facie* evidence of a right to the soil extending to the centre of the road,

A recent right founded on an inclosure under an act of Parliament, does not make a distinction with regard to the general law,
Costs.

COOKE V. GREEN,

THE Plaintiff brought this action of trespass against the Defendant for breaking and entering a certain close, and choking and filling up a pond therein, and erecting a fence thereon.

On the trial of the cause before the Lord Chief Baron and a common jury, at the last Assizes for the County of Hertford, a verdict was found for the Defendant.

Comyn, in the following term, moved for a rule to shew cause why there should not be a new trial, on the ground that the verdict of the jury was against the weight of the evidence of acts of ownership and continued enjoyment, and the direction of the learned judge who tried the cause.

Circumstances affecting the conduct, and im-

peaching

1893.
Cook v.
Graham?
peaching the integrity of some of the jury (who were suggested to have been prejudiced and tampered with), being about to be urged to the Court, from affidavits made in support of the application, they refused to hear any thing imputing improper motives to the jurymen (a), observing that they had no authority on such a motion as the present to take notice of their misconduct, even if a strong and flagrant case were made out; and that the only means which they possessed of counteracting the evil consequences of such misconduct as affecting the party, were the granting new trials in cases where their verdict was palpably wrong, to whatever cause that might be attributed.

The Court granted the motion, ordering a rule to show cause; but they directed particularly that care should be taken in drawing up the order, to exclude every thing which might be construed to indicate that the rule was founded on the last ground of objection now taken to the verdict, imputing partiality to some of the jury.

The Lord Chief Baron now read his report of the evidence given on the trial.

The substantial effect of the whole was, that the Plaintiff had proved at the trial the following case.

The pond in question was nearly surrounded by the Plaintiff's land, excepting one part which ad-

(a) Vide *Onions v. Nash*, ante, vol. VII. p. 203.

joined

1833.

*Doorn
v.
Gault.*

joined an old road that passed through the Plaintiff's land, and by a stable belonging to the public-house in the occupation of Defendant. The Plaintiff had procured that road to be stopped up by an order of Magistrates, except that small part at one end of it, which lay between the Defendant's stable and the pond, extending nearly along one side of the pond. The Defendant had laid dung on that part of the old road next the pond, to the great damage of the water, which the cattle had refused to drink in consequence. The Defendant had hitherto inclosed that part of the road and a part of the pond (which he had also filled up), by making a fence, and that was the trespass which was the subject-matter of the present action. The public-house and stable in the occupation of the Defendant, and the land adjoining the pond, had been recently the property of one person, who had bought it of Lord *Essex*, the original owner of the whole estate, till purchased separately from him, the former by the Defendant's landlord, the latter by the Plaintiff.

The Plaintiff gave evidence of acts of ownership in his having often cleaned out the pond, and had the mud and soil on his own land, and having also inclosed part of the pond by making a fence across it, which he had left open at the bottom.

On the part of the Defendant, it was proved by a person who had occupied the Defendant's house and stable, and the other property surrounding the pond before it was separated by being sold to separate

estate (purchase) and who had known the premises about 80 years, that the pond and the lands adjoining it, now the property of the Plaintiff, were, during the early part of his tenancy, a waste and open common, and that the pond was part of the common, but that they were afterwards inclosed by Act of Parliament. He proved various acts of ownership on the part of himself as tenant. He also stated that he had applied to his then landlord, Lord Ebor, to whom the lands had been allotted, for permission to inclose part of the pond, but that his Lordship refused it, giving as his reason for such refusal that he would not encroach. One of the witnesses proved that he had cleaned out the pond on one occasion, and meant to have bid the debt to his own land, but the Plaintiff sent his men, and took it to his (Plaintiff's) ground; of which the witness did not complain. The road between the pond and the Defendant's stable was proved to be the only means of access which the Defendant had to the latter.

The *Chief Baron* directed the jury that it had been proved that the Plaintiff was owner of the adjoining land, and that the rule of law was that the owners of land adjoining a road were entitled to claim property to half the soil of the road, unless a contrary right were proved; and that he considered the weight of the evidence, in this case, was in favour of the Plaintiff, but the jury found a verdict for the Defendant.

On this point, the *Chief Baron* now showed cause. He contended that there

1881.
v.
Smith.

there having been evidence given on both sides in this case, it was the province of the jury to determine it, and their verdict was conclusive.

He then entered particularly and minutely into the evidence given on the trial, submitting that the testimony, on the part of the Defendant, had furnished at least as strong a case as that which had been produced in support of the action, and that the acts of ownership, such as they were, proved nothing for the Plaintiff—that the fact that the whole of the soil, until it had been recently inclosed, having been open to the public as waste or common land, distinguished this case from those wherein actions of trespass were brought to try rights founded on ancient possession; and that, in truth, so far from the Defendant having trespassed on the Plaintiff, the Plaintiff and the public had been trespassers on him.

If any injury had been done to the Plaintiff, in consequence of the Defendant having corrupted the water of the pond, it was urged he could have no remedy in this action of trespass, but he should have brought an action on the case.

It was also urged, that the utmost possible amount of the damage consequent upon such a trespass would necessarily be so small, if the right were on the side of the Plaintiff, as to furnish at once, and in limine, a conclusive and unanswerable objection to the application for a new trial, according to the useful rule in that respect adopted by all

all the Courts, and that consequently this rule ought to be discharged.

Comyn, in support of the rule, was stopped by the Court.

RICHARDS, Lord Chief Baron. In a case of this sort, we are of opinion that the verdict of the jury, under the circumstances in evidence, ought not to conclude the Court where the true object of the action is the determination of a right, which it would be the effect of the verdict to decide conclusively.

For the same reason, we think the extent of the trespass, and the damage, cannot be taken into consideration by the Court, as an objection to our granting the Plaintiff a new trial. We are all of opinion that there ought to be a new trial in this case: and as we send back the case on the evidence given in the cause on the former occasion, we think it right, for obvious reasons, to say nothing more than that we must make this

Rule absolute.

Costs.

BELL and Others v. HORTON.

ON the motion of *D. E. Jones*, that the Defendant in this case might have time to justify bail at a

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Baron's

1823.

COOKE
P.
GAMEN.

1823.

12th February.

The Court will now give time to justify bail at Chambers.

1823.

BELL
and Others
v.
HORTON.

Baron's Chambers after Term, the Court, after much hesitation, in consideration of their having heretofore, in all cases, refused to permit a justification at chambers, granted the motion.

* * This accommodation has of late been extended by the Barons, to most of the various matters of business which the other Courts permit to be transacted before a single Judge at Chambers, but which have heretofore been uniformly refused to be taken there.

1823.

12th February.

BROADRICK v. CLARK and Others.

The Court will not change the venue from the county of Gloucester to the city of Bristol, in Hilary Term, on the usual affidavit, although the Defendant swear to merits, and offer to pay into Court the debt, and a sum of money to cover Costs.

A Rule obtained on such an application discharged with Costs.

RICHARDS shewed cause against this rule, which had been obtained by *Manning*, calling on the Plaintiff to shew why the venue in this case should not be changed from the County of Gloucester to the City of Bristol. The application had been made on the usual affidavit, the Defendant also swearing to merits; and it had been proposed, as the terms of granting the motion, that the Defendant should pay the debt into Court (27*l.* 7*s.*), and 30*l.* to answer costs.

The ground of opposition to the motion was the established practice, which precludes a Defendant from changing the venue in Hilary Term, into a county where there are no Summer Assizes, which, it was insisted, was peremptory, and could not be departed from.

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In support of the rule, it was urged that the practice was not without exception, and the offer of terms was pressed, as distinguishing this from the ordinary application, and entitling the party to favour, where the object of the motion was to save great and unnecessary expense where merits were sworn to.

1823.
BROADBENT
v.
CLARK
and Others.

The case of *Walton v. Hutton* (a) was referred to, where, upon a motion to change the venue from *London* to *Cumberland*, in *Hilary* Term, upon the usual affidavit, the Court refused the application, on the sole ground that the affidavit did not swear to merits, and the party was directed to amend the affidavit in that respect.

Per Curiam. The rule which the Courts have adopted, that they will not change the venue in *Hilary* Term to a county where there are no Spring Assizes, is one which ought to be adhered to, and in this case we are of opinion that it ought not to be departed from. The difference in expense of trying a cause in *Gloucester* or *Bristol* cannot be very great, as it would be in the case of *London* and *Cumberland*. We see nothing in the foundation of this application to induce us to except it from the general rule of practice. The rule must therefore be discharged, and with costs.

Rule discharged with Costs.

(a) 1 Chitty's Rep. 14.

MEMORANDA.

In the course of this Term, Sir GEORGE WOOD resigned his office of Baron of the Exchequer, &c. &c.—delivering his Commissions into the hands of the *Lord Chief Baron*.

In the following Vacation, JOHN HULLOCK, Esq. Serjeant at Law, was appointed a Baron of his Majesty's Exchequer.

END OF HILARY TERM.

SITTINGS

AFTER

HILARY TERM,

4 GEO. IV.

GRAY'S INN HALL.

WILLIAMSON v. THOMPSON and Others.

— v. { LORD LONSDALE and Others.
HUTTON and Others.

1823.

Friday,
21st February.

Costs (in
equity).

Defendants
in a tithe cause
made Plain-
tiffs at law, for
the purpose
of trying a
feigned issue,
directed to

THESE causes, which had been frequently before the Court, (the issues and orders from time to time having been often tried and sent down again (a)) now came on for further directions, chiefly as to the question of costs, the parties hav-

assist the Court in determining the question of modus raised by the answer, succeeding on several occasions in obtaining verdicts, which were afterwards successively set aside as not satisfactory to the Court of Equity and new trials granted, the last being taken by the Plaintiff at law by consent, each party to pay his own costs at law and in equity—Bill dismissed on further directions without costs.

So, where the Defendant in equity (Plaintiff at law) after two trials of the issue, on the third reformed the issue, and thereupon the Defendant at law (Plaintiff in equity) obtained on petition an order, that the issue should be taken as confessed after the cause had been carried down and notice of trial given, the bill was dismissed without costs, on the ground that the Plaintiff in equity had been misled by the Record down to the last moment, the Court holding that the defence should be so stated in the answer, as that the Plaintiff might be fully and accurately aware of the whole of the matter really intended to be ultimately relied on, in resistance of his demand in the suit in equity.

Where after several trials at law, the jury ultimately found in one case a verdict for the modus (a district modus) not generally and as laid, but with an exception of certain lands within the district, not describing what lands, or in whose occupation they were, and in the other a verdict also for the modus, but the *postea* was accompanied with a certificate of the judge, noticing certain exceptions to the modus—the bills were dismissed without costs.

Cases of moduses found differing from those laid in the answer, and directed to be tried by the issue ordered, but received and acted upon by the Court, disapproved, and the reasons stated.

(a) Vide *ante*, Vol. V. p. 25. *Williamson v. Lord Lonsdale*, and Vol. IX. p. 186. *et seq.*

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subscribed to the *postea*, the Defendant at law (the Vicar) applied for, and obtained an order for a new trial in *Hilary* Term, 1822, but when the cause (*Robinson v. Williamson*) had been carried down, the vicar's counsel gave the Plaintiff a verdict by consent with respect to the *Winton* modus, each party to pay his own costs at law and in equity as to that township.

1822.
WILLIAMSON
v.
THOMPSON
and Others.

With respect to the township of *Mallerstang*, the Vicar (the Defendant at law and Plaintiff in equity) after notice of trial had been given to him for the *Lancaster* Summer Assizes, 1821, presented a petition to the *Lord Chief Baron* then on the circuit, and obtained an order thereupon that the issue should be taken as confessed, and that all further proceedings should be stayed without prejudice to the Defendants in equity, setting down the cause for further directions. This township of *Mallertang*, was one of those in respect of which there had been an order made (on petition) for a rehearing, 18th *May*, 1819 (a), but the additional evidence given upon that occasion was not considered sufficient to enable the *Chief Baron* to dispense with the issue which had been directed as to that township. An application had been made to set aside the verdict, which was afterwards obtained on the ground of the order for a rehearing having been pronounced, but the Court refused the motion, considering that such an order did not operate to stay

Township of
Mallerstang
issue.

(a) *Vide ante*, Vol. IX. p. 196.

the

ing come to an arrangement between themselves, the result of which was, that verdicts had been entered for the Defendants in equity (Plaintiffs at law) by consent. The principal point discussed on the present occasion was, whether the Defendants, having succeeded to a certain extent at law, as to part of their case, and consequently in equity, inasmuch as they had obtained verdicts, were entitled to have the bills dismissed as against them so far, with costs.

On the last occasion of trying the several issues, in which the Defendants were Plaintiffs, verdicts had again been found in their favour establishing the *Winton* and *Mallerstang* moduses of 15s. and 15s. 2d., in lieu of the tithe of grass made into hay, and of agistment.

The *Winton* modus of 15s. was first tried on an issue directed by the Court for that purpose, (Sittings after *Michaelmas* Term, 1818,) at the *Westmoreland* Summer Assizes in 1819. It was afterwards tried at *Lancaster*, at the Summer Assizes of 1821, when verdicts were found on each occasion for the Defendant in favour of the modus. The verdict on the last trial having been qualified by the certificate of the learned judge* (*Holroyd*)

* "That the said payment of 15s. was exclusive of a certain payment of 2s. 8d. per annum, which has been made to the vicar of the said parish, his lessee or farmer, in lieu of certain tithes of that part of certain lands called Coatgarth, which lies within the said township of Winton; and also of a certain other yearly payment which has been made to the vicar of the said parish, his lessee or farmer, for or in respect of certain tithes for certain other lands called Improvement, belonging to a tenement called Rookby Scarth."

subscribed

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1822.
WILLIAMSON
v.
THOMPSON
and Others.

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Township of
Mallerstang
issue.

(a) Vide *ante*, Vol. IX. p. 196.

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the proceedings, and the issue was tried at the *Westmoreland* Summer Assizes, 1821, when a verdict was found for the Plaintiff in the issue of *Tunstall v. Williamson*, the Defendant in equity. In the following term that verdict was set aside, with a reference to the Master to tax the Defendant *Tunstall*, his costs of appearing upon the application. A subsequent application to give him the costs of the trial of the issue was refused by the Court, who were of opinion that they should be taken to be costs in the cause. An application was then made for altering the terms of the issue, so as that the modus to be tried (which had been framed to correspond with the answer and decree, wherein it was stated to be "payable by the land-owners, or some, or one of them, on behalf of "the others or other of them") should be worded as "payable by all the land-owners, or by some "or one of them on behalf of all of them:" and an order was made at the Sittings after *Trinity* Term (24th *June*), for so altering the terms of the issue upon payment of the vicar's costs of appearing on the application. The issue was thereupon redelivered, and notice of trial was given for the ensuing *Lancaster* Assizes. The Record was made up and sent down; and then the vicar presented the petition and obtained the order as above stated.

Naithby issue.

As far as these causes respected the issue as to the township of *Naithby*—ordered for trying the modus of 3*s.* 6½*d.* as covering the tithe of hay and agistment within that district which modus the jury found,

1823.

WILLIAMSON
v.
THOMPSON
and Others.

found, but with the following exception; "*except such parts of Wharton demesne as lay within the township*", it had been contended, on coming on for further directions (*Hilary Term, 1822*), that such a finding was substantially against the *modus*, negating its existence. The questions arising on that finding were very fully discussed, and the matter was adjourned for judgment.

The main question which had been made on that occasion was, whether the finding of the jury amounted in effect and substance to a verdict for or against the Defendant? or whether it was adverse to, or in favour of the existence of the *modus*? although it was different in terms from that which had been set up by the answer, and which it had been the object of the issue to try.

Fonblanque, Martin, and Boteler for the Plaintiffs at law (Defendants in equity) contended on the one hand, that although the jury had added an exception to the *modus* found by them, which had not been stated in the answer, nor made part of the issue, still it was a finding substantially establishing a *modus* payable in lieu of the tithes in dispute, in respect of the lands in the Defendant's occupation; and that therefore the verdict entitled the Defendants to insist on it as a finding in favour of the *modus*. And they insisted that the Plaintiff's bill ought therefore so far to be now dismissed with costs.

In support of that first proposition they cited the

the following authorities. In the case of *Knight v. Walker and Others* (a), an issue had been directed to try whether there existed a composition real, discharging certain lands in the possession of the Defendants from the payment of tithes in kind. The jury found a verdict for the Plaintiff as to part of the lands said to be covered by the composition, and for the Defendants as to other parts. The *postea* was endorsed that seventy acres of land in the Defendant *Walker's* possession were granted and enjoyed in full satisfaction of all tithes arising upon &c. — certain parts of the lands belonging to some of the Defendants, — and not as to other parts &c. — mentioning other lands in the possession of others of the Defendants. — Upon that finding the Court ordered the first named Defendants to account, and that the Defendant *Seager* be dismissed with costs both at law and in equity. Report confirmed as to Defendants *Walker* and *Smith*, without costs on either side. To the same point they cited also, *Knight v. Robinson* (b), and *Bennett v. Alenby* (c).

They next adverted to the case of *Markham v. Laycock* (d), where an issue directed to try a modus of 3*l.* a-year, in lieu of the tithes of hay, agistment, foals, calves, wool, lambs, and other tithes of *Carleton Hall Farm*.

(a) 12 Wood, T. Dec. 115.

To a question put by the Chief Baron, it was said that the report did not state whether the endorsement on the *postea* was by certificate, or was part of the verdict.

(d) 4 Wood, 35. (e) *Ibid.* 54. (f) *Ibid.* 37.

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The jury found there was no such *modus* as alleged by the Plaintiffs in the issue, but they found that a *modus* of 9*l.* a-year payable in lieu of the tithes of milk, wool, lambs and calves, only.

1893.
WILLIAMSON
v.
THOMPSON
and Others.

The Court thereupon ordered the Deputy Remembrancer to take an account of what was due from the Defendants for the tithes of hay and of agistment demanded by the bill, and also of what was due from the Defendants for the said *modus* of 9*l.* a-year; but without costs, the Plaintiff to have his costs at law. Bill to be dismissed without costs, so far as the same sought on account of the tithes of calves, wool, and lambs.

That they much relied on as a strong decision in favour of the present verdict, as a finding of the issue for the Defendant.

91 [RICHARDS, Chief Baron.—That certainly seems to be a strong case, but I must say that I should be very unwilling to be bound by it, and if I should find it so strong as to be obliged to submit to it, I should do so most reluctantly. For the most part we know nothing of the circumstances of the cases in which the decrees that are collected in Mr. Wood's book were pronounced, and they cannot therefore be used in general as authorities furnishing principles which can be conveniently applied to other cases. I have certainly always understood that it was the bounden duty of occupiers, Defendants in tithe causes, setting up *moduses*, to state that defence with precision, and so as that

Plaintiffs

1828

WILLIAMSON

v.

THOMSON
and Others.

Plaintiffs may know with some degree of certainty what case they will have to meet. If an issue should be directed, Plaintiffs have a right to avail themselves of an untrue defence. If a Defendant sets up a modus of 6*d.* as covering a farm and protecting it from payment of tithes in kind, and upon the trial of an issue directed to try that modus should prove an annual payment of 2*d.* a decree for an account must go in such a case. If it can be shewn that the practice of this Court has been uniformly otherwise, perhaps I may in that case be obliged to hold it to be my duty to abide by it, however I may disapprove of such doctrine; but I shall expect to have it shewn to be such an established uniform practice as that it cannot on that account be departed from. At present I feel anxious to throw out this opinion by way of observation, because what these cases are said to establish, is quite inconsistent with the general notion I have always had of what was right and proper to be done in causes so circumstanced. If I am not correct in the view I have of this matter, it is quite obvious that the Plaintiff might, on every occasion of a bill filed for an account of tithes in kind, be entrapped into prosecuting to a decree an expensive suit; and when the cause has reached the stage of the trial of an issue to get at the truth of the defence upon the record, and the facts of the case as stated on either side, the Plaintiff, to his surprise, must submit to have a new and totally different matter of defence established against him at law, and that at his own expense. In that way he would always be punished, because the Defendant

defendant either does not know his own case, or does not choose to state it truly; whereas if he had done so in the first instance, the Plaintiff might have desisted from proceeding further in his suit.]

1853.
WHELANSON
v.
TUCKERSON
and Others.

The Defendant's Counsel, after adverting to the weight of authority due to the Judges by whom those cases were decided, then cited to the same point the case of *Eade v. Gooch* (a), where the Jury found against the moduses of 4d. an acre for bottom-meadow in lieu of grass and hay growing (&c.) and 2d. an acre for hard land meadow, but the Judge (Sir William Blackstone), endorsed the postea, that it appeared in evidence, and was so found; that notwithstanding there were no such moduses as those mentioned in the issues, there was a modus for, &c. when the same shall be mowed, and of 2d. for (&c.) in the same manner; whereupon the Court decreed the Defendant to account according to the said moduses. In *Zouch v. Hudson* (b), also a verdict having been found, that a modus (in issue) of 6l. a-year had not been paid in lieu of the tithe of the lands mentioned in the first count of the declaration, there was a special endorsement on the postea (certified by Mr. Justice Rooke to have been made by his direction) that a modus of 6l. was payable for some of those lands (excepting others)—whereupon it was decreed, that so much of the Bill as prayed an account of the tithes arising upon the lands and premises

(a) 13 Mod. 645. (b) 4 Wood, T. Dec. 560, found

1823.

WILLIAMSON
vs
THOMPSON
and Others.

found by the said *postea* in favour of the Defendants, *H. Cholmley* and *Sir J. N. Innes*, be dismissed without costs, and no costs to either party at law. To those cases they added *Gills v. Horrex* (a), *Bennett v. Peart* (b), and *Franklin v. Spilling* (c), and they submitted that these fully established the proposition that such qualified verdict as the present was admissible, and sufficient to enable the Court on the return of the *postea* to act upon it, and pronounce a decree accordingly. At all events they proved that it was not the practice observed by the Court in cases so circumstanced; to give the party defending the issue and Plaintiff in Equity the costs on dismissing the Bill; and they submitted; that according to the usual course the justice of the case required that the Bill should be dismissed with costs.

Jervis and *Barber*, on the other side, contended, that the finding of the Jury was in effect against the *modus*, and that there ought to be a decree for an account with costs.

They insisted that a district *modus*, with an exception of certain parts, could not be supported, even if the verdict could be considered as in favour of the Plaintiffs in the issue; and they distinguished this case from those which had been cited, in that the *moduses* in those cases were all farm *moduses*, and the finding of the Jury in each of them was more conclusive and certain than in

(a) 2 Wood, T. Dec. 534. (b) 4 Ibid. 236. (c) Ibid. 490.

the present case. They urged that an exception off certain lands out of the township, said to be covered by the modus, without stating what the excepted lands were, or the quantity or number of acres, or giving any description of them, or setting out their boundaries, destroyed the finding, or at least so vitiated it, as that it could not be received or acted on by the Court: or if the verdict could be received, it was a verdict in substance and effect in favour of the vicar, as it in fact negatived the modus as laid, the only modus which the Jury had to try. They insisted, that if such a modus as that which had been found by this verdict, had been so stated in the answer, it would have been badly laid, and a decree for an account must have been pronounced on that ground.

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At all events, they urged, in whatever manner the Court might now think fit to dispose of the remaining questions in these causes, the Plaintiff in equity would be entitled to his costs.

Egblanque in reply, proposed that any difficulty presented by the exception introduced into the finding of the Jury, in consequence of any of the uncertainties which had been objected to, might be obviated by directing a reference to inquire of it, whereby the fact might be ascertained; and that, he submitted, would be quite practicable. The Jury having found the existence of the modus protecting a known and definite district from the payment of tithes in kind, he contended that any objection

which might be taken to the introduction of an exception in a verdict finding the existence of a farm modus, must be equally applicable to a district modus, as both were entire things, and both, if either should be objectionable, must be bad. He concluded by insisting that the statement of a modus, as found by the verdict of a Jury upon an issue, was entitled to greater consideration, and should be liable to less cavil than the laying a modus in an answer upon the record.

[RICHARDS, *Chief Baron*.—My difficulty certainly has been and will be, that I shall, I fear, be unable to do any thing upon this verdict. It appears that certain lands within the district, whatever they are, and in whose occupation they may be, are liable to tithes. What then can I do in this case? I cannot adopt the finding of the Jury, nor can I direct the Master to inquire whether the modus covers this or that part of the district, or is protected or not by the payment, or whether the protected or the unprotected parts are in the occupation of any of the Defendants, or not. There is no case that I am aware of, which furnishes a precedent for sending such inquiries to the Master. Many of the cases which have been cited on this occasion, I cannot, upon full consideration, approve, for the reasons which I have already stated. I shall, however, take time to look into them, as it is my duty to do, and give them my best attention.]

The case was thereupon adjourned for judgment.

On

On this day when the first cause had been heard on further directions (as stated), the Lord Chief Baron delivered judgment in each of the cases, beginning with the first, as having been immediately before him.

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21st February.

Having stated the facts and the different circumstances attending the several trials of the different issues, his Lordship proceeded as follows:—

The frequency of trial of the issues in these cases is attributable in great measure to the inconclusive manner in which they had been necessarily framed, on account of the mode in which the moduses were laid in the answers, which, however, I considered at the hearing were legally pleaded. Then the verdicts which were obtained from time to time were not satisfactory to me, sometimes from the manner in which they had been obtained; at other times because the verdicts were such as to afford me no assistance; so that in effect, with reference to the objects of the issues, they were no verdicts at all. That arose from the moduses having been so pleaded as that the Master could not shape the issues so as to attain the proper object. At length the Plaintiffs (at law) made an application for a reform of the issues. As soon as that was done, the Plaintiff (in equity) finding that he could not proceed further, very prudently and properly gave up the point. It is but fair to consider, therefore, that he would have done so in an earlier stage of the proceedings, if the Defendants had properly stated their defence

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in their answer; when in all probability the Plaintiff (in equity) would have submitted; but he was misled throughout, for he could be guided only by the issue. Can it be said that it was against conscience then that he should proceed in his resistance to a modus pleaded against him, because it might turn out there was another modus which had not been set up? Certainly not. It was wholly the Defendants' fault therefore that the Plaintiff proceeded so far; they, in fact, have made him go on. How then can I say, that the Plaintiff is to be blamed for what he has been induced by the Defendants' proceedings to do? I must say that the Defendants were to blame for all that has occurred.

Under these circumstances, I cannot call on the Plaintiff to pay any costs. His Bill must be dismissed certainly, but not with costs. A Plaintiff cannot have his costs where the Bill is ordered to be dismissed, or I should have considered that matter.

The bill (as to the *Winton* modus) dismissed, without costs.

As to the case of the township of *Naithby*, that has certainly given rise to more difficulty. The Defendant put the modus in his answer in general terms. The Jury on the last trial of this issue negatived the modus as laid, but they found another. In the other case, the Judge who tried it certified an exception varying the modes. The certificate is sufficiently plain. As it is, I cannot make a decree

a decree for the Plaintiff. I must therefore dismiss his bill. In this case also it was the Defendants' fault that the Plaintiff proceeded so far. Here too he was misled by the defence set up, down to the time when the verdict was given. That is a matter which I must take into consideration on the question of costs. It would be too strong a thing to make a party who succeeds in equity, and does not fail on the issue, pay any part of the costs. I certainly cannot give costs against the Plaintiff. His bill in this case also must be dismissed, but without costs.

Bill dismissed, without costs.

HIGHAM v. ANTWIS and Others.

GARDNER moved *ex parte* to extend the injunction already issued in this cause, and to restrain the Defendant *Antwis* from proceeding to trial in this action, until he and another Defendant should have appeared and answered the Plaintiff's bill. He moved on an affidavit that a bill had been filed for a discovery in aid of the Plaintiff's defence to an action at law, and for an injunction to stay proceedings in the mean time—that the promissory note on which the action was brought had been obtained by fraud and misrepresentation—that one of the Defendants only had appeared to the bill, but had not put in an answer—that *Antwis* and the other Defendant had not appeared to the bill and were in contempt—and that an injunction had been obtained against them with which they had been both duly served.

The

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Tuesday,
25th Feb.

The Court refused to grant a motion made *ex parte* to extend an injunction to stay trial, till two of three Defendants who had not appeared to the bill, and were in contempt, should have appeared and answered, observing that *non constat*, if they had been served with notice of the motion, that they might not have shewn that they had appeared and cleared their contempts.

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The Court inquired if the Defendants had had notice of the motion, and were informed that they had not, but it was submitted that notice was not necessary under the circumstances set forth in the affidavit.

Per Curiam,

It is stated certainly that two of the Defendants have not appeared to the bill, and are in contempt. They may however have now appeared, and if they have, such an order as this could not be made *ex parte*. If they had had notice of this motion, they might have shewn that they had appeared, and even have cleared their contempt. At present we cannot know that they have not done so.

Refused.

1823.
25th Feb.

The commencement of a suit by information by the Attorney-General on the part of the Crown, for the recovery of forfeitures under a penal Act of Parliament, must, with reference to the Statute of Limitations, be taken to be the issuing of the process, and not the actual filing of the information.

The ATTORNEY-GENERAL v. HALL.

THE *Attorney-General* now shewed cause against making absolute a rule which had been obtained in this case in last *Michaelmas* Term, by *Park* on the part of the Defendant, calling on the Crown to shew cause why the information which had been filed in this case against the Defendant as of *Hilary* Term 2 and 3 *Geo. 4.* generally, should not be entitled as of the true day on which it was in fact filed.

The object of the motion was to acquire for the Defendant

Defendant an opportunity of pleading the Statute of Limitations, the 31 *Elix. c. 5. s. 5. (a)*, in bar of the information.

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The rule had been granted upon an affidavit wherein it was stated that the information (which was *in personam* for the recovery of penalties from the Defendant on account of alleged illicit practices in fraud of the revenue, committed by him in his business of a maltster) had not been filed even in *Easter Term*, nor in fact until the *Easter vacation*. It also stated that the Defendant had been served with process (*subpœna ad respondendum*) on the 29th of *March* last, that the writ was not issued till the 20th of *March*, 1822, and that it was tested the 12th of *February*, *Hilary Term* 2 and 3 *Geo. 4.*, and was made returnable the 24th of *April*, which was in last *Easter Term*, 3 *Geo. 4.* It was also sworn in the affidavit, that

(a) Enacting, "that all actions, suits, bills, indictments, informations, which after twenty days next after the end of this Session of Parliament, shall be had, brought, sued, or exhibited, for any forfeiture upon any statute penal, made or to be made, whereby the forfeiture is or shall be limited to the Queen, her heirs or successors only, shall be had, brought, sued, or exhibited within two years after the offence committed

"or to be committed against such act penal, and not after two years."
"And if any action, suit, bill, indictment, or information, upon any offence against any penal statute made or to be made, except the statute of tillage, shall be brought after the time in that behalf before limited, that then the same shall be void and of none effect, any act, (sic.) notwithstanding."

the

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the Defendant had not been in business as a master for the last three years preceding the filing of the information.

Upon these facts the *Attorney-General* contended that the rule could not be made absolute; that according to the established practice of the Court, what was now sought to be done by the present motion could not be permitted.

He also urged that the order if made would not serve the Defendant, nor give him the opportunity of pleading the statute which was the object of his motion, for that the filing of the information was not in fact or in law the commencement of the suit, but that the suit was substantially commenced by the issuing of process. That point, it was submitted, had been ruled in the case of the *Attorney-General v. Brown (a)*, where it was decided to be a practice so long established to consider the copies as the commencement of the proceedings, as that the Court would not break in upon it on a motion. So in the case of the *Attorney-General v. Wren*, 47 Geo. 3. the same question was determined in the same manner.

Admitting therefore, that a Defendant might upon the trial of an information to which he should have pleaded the statute, shew that the action, suit, bill, or information, had not been had or brought, &c. till more than two years after the

(a) Fort. Exchequer Rep. 110.

offence alleged to have been committed, and for which the penalty was sought to be recovered, it would be necessary for him to take as the period of the having, bringing, (&c.) the proceeding intended to be barred, the time when the process was in fact actually sued out, because then it is that the suit is commenced, and not in any later stage of the proceeding. The same construction had been always put upon the Statutes of Limitation of personal actions, and that construction was sanctioned by good sense.

It was stated in argument that in practice the process (in this case a *subpoena*) was supposed to be issued upon an information exhibited in Court, and therefore when the information is afterwards filed it is entitled as of the Term in which the process bears teste, and it was said that this was mere matter of form to render the process and the information consistent with the practice in title and teste.

Perke, in support of the rule, contended that in the case of the *Attorney-General* seeking by information to recover forfeitures upon penal Statutes, the commencement of the proceeding was the *exhibiting* and filing of the information, for that is in fact the foundation of all the subsequent steps, and even of the issuing of the process, as had been stated by the *Attorney-General* in shewing cause against the rule.

In whatever cases it may have been determined
that

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that the issuing process was the criterion of the commencement of the suit, he urged that in a proceeding of this nature the Defendant had a right to apply to the Court, *ex debito justitiæ*, to have the precise day of the commencement of the suit put upon the record, to afford him an opportunity of making a defence which had been given to him by statute, and which it was necessary that he should plead in bar of the proceeding: and he likened the present application to the common motions for similar purposes, in cases of so reducing the general title of Common Law declarations.

He referred to the authority of the determination in *Smith v. Key* (a), *Southouse v. Allen* (b), and *Wiles v. Earl of Halifax* (c), and *Thompson v. Marshall* (d), submitting that there was nothing in the mere practice of the Court which should operate to deprive a party of an advantage that had been given to him by the Legislature, or to shut him out from the provisions of an Act of Parliament passed expressly for the ease and quiet of persons in his situation.

RICHARDS, *Chief Baron*.—We must treat this motion as an application made in the Court of *Exchequer*, and the course of this Court has never been to adopt as the practice what is now proposed to be done. No precedent has been shewn in fa-

(a) 1 Stra. Rep. 638.

(b) Cases temp. Hard. 141.

(c) 2 Wils. 256.

(d) 1 Wilson, 304.

your of that proposition to support the present motion. The only authority produced upon the subject is entirely the other way; and the case in which a similar application was refused is directly in point. We cannot therefore in the present instance alter at once the established and recognized practice of the Court upon such a motion as the present.

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The
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GENERAL
O.
HALL.

GRAHAM, Baron.—The Act of Parliament has no reference to the commencement of the action or suit; the period therefore of commencement of proceedings must be determined by the acknowledged practice of the Court, and the understanding which has always prevailed.

(d) 1831

In this case the writ was served in vacation, and I apprehend there is no instance to be found of an information not as of Term in this Court.

Rule discharged.

[On

[On the LORD TREASURER'S REMEMBRANCER'S
SIDE.]

In the matter of

1823.

24th February.

A FINE set upon the INHABITANTS of the CITY of
NORWICH.

Jurisdiction.

Instance of the exercise of the power of the Barons to respite process issued in respect of fines imposed at the Assizes upon inhabitants of towns, &c. on presentments when estreated into the Exchequer, upon summary application on reasonable grounds.

Mode of obtaining the order of the Court for that purpose.

Such orders will not ordinarily be made indefinitely, or until further order generally, but merely from term to term.

IT was now moved by *Jervis*, that the fine of 500*l.* which had been imposed on the inhabitants of the city of *Norwich* at the last Summer Assizes and General Gaol Delivery, for not repairing, &c. (after due presentment by the Grand Jury in *August*, 1821, of the insufficiency and insecurity and want of repair,) the gaol of the said city, might be respited *until further order*.

The application was made upon production of the *constat* of the fine under the hand of the Deputy Clerk of the Foreign Estreats, and the affidavit of the Clerk of the Peace for the said city, setting forth such reasons at considerable length, accounting for the delay, and exonerating the city from neglect, as the Court considered sufficient for granting the motion to a certain extent; although they refused it in the general terms prayed,—their order being that all process for levying the said fine should be respited *till the last day of Easter Term* *.

* The extent and applicability of the authority and jurisdiction of the Court of *Exchequer*, on the Treasurer's Remembrancer's side, in respect of these fines, &c. are not sufficiently generally known
for

for the advancement of the purposes of utility to which they may be made subservient.

1893.

The above is a Common Order of the Court, made on ordinary occasions. In the notes below two orders are selected from the earlier Order Books, to shew further the extensive jurisdiction which this Court is authorized to exercise in respect of such matters, after they are once estreated into the *Exchequer*. From that time they become subject to the orders, not of the original authority by which they were at first imposed, but to the control of the Court of *Exchequer* as being thenceforth part of the casual or foreign revenue, commonly known by the denomination of Profits of the Green-wax (a).

Ex Libro Ordinum—Ex parte Rem. Thos.

H. T. 2 & 3 Jac. 2.

Cornub. ss. { UPON the motion of Mr. Courtney (&c.)
and hearing (the *Attorney General*) for
the King and the Constable of the Castle of
Launceston in said county and hearing (several
counsel) for the inhabitants of the said county
and reading a former order (Ven. 26 November
M. T.) and shewing from a *constat* under the
hand of the Deputy Clerk of Estreats that
amongst the fines set and imposed at the Ge-
neral Gaol Delivery held (&c. 7 March 1st Jac.)

(a) See "PRICE's Treatise on the Court of *Exchequer*, Book I.
Cap. 33."

there

1831.

there is estreated into this Court a fine of 50*l.* upon the said inhabitants then sett upon them for not repairing and upholding the Gaole of *Launceston* aforesaid. Also (&c. a further fine of 100*l.* the 18th *March* last) in all 150*l.* And it being then shewn unto this Court by (&c. the Counsel for the Inhabitants) that the said Gaole ought not to be repaired or sustayned by the aforesaid inhabitants they having no power to enter in the said Gaole nor were ever concerned in repairing the same and that Sir *Hugh Piper* his Majesty's said Constable of the Castle of *Launceston* hath the custody thereof by virtue of a patent for his life by the grant of his late Majesty—it was then ordered by this Court that the said *Hugh Piper* doth some time in the next Term make his defence as to the repairing the said Gaole and in the mean time levies be forborne against the said inhabitants for the aforesaid fine. And his Majesty's Attorney General this day praying that process may be awarded for levying the said fine upon the said inhabitants and further shewing that the said Gaole is to be repaired and sustained by the inhabitants &c. and not by the King or the said Sir *Hugh Piper*. And upon hearing Mr. *Ward* and Mr. *Jennet* for the inhabitants and reading the affidavits off &c. It is thereupon this day ordered by this Court that all process stay and levies be forborne against the said inhabitants for the said fines of 150*l.* until the first day of next Court and that in the mean time the said inhabitants do plead in discharge of their said fines.

E. T.

E. T. 3 Jac. 2.

1831

Tuesday, 2d May.

Middlesex,
City Westminster. } UPON the motion of Sir John
Holt Knight (K. S. L.) and hear-
ing (&c. two other Counsel) for the King and
the Inhabitants of the county of *Middlesex* and
(&c. Counsel for the Inhabitants of the Liberty of
the City of *Westminster*)—and reading a former
order shewing that the inhabitants of the county
were ordered at the Sessions for the county 20th
February last and fined 100*l.* on their confession
for not repairing *Brentford* bridge and that an
equal tax was made and assessed upon the se-
veral parishes in the said county for the repairing
the bridge and that several parishes in the said
liberty of *Westminster* do refuse to make a rate
for the levying and paying the monies assessed
upon them it was by order of this Court (30th
April last) ordered that the said fine be imme-
diately attreated and process awarded for levying
the same and afterwards it was ordered that the
monies levied be brought into Court and that
the said inhabitants do shew cause this day why
the said fine should not be levied upon them
And Sir John Holt this day shewing (&c. that
the inhabitants of the county are willing to pay
&c. and that the inhabitants of *Westminster* still
refuse to contribute &c. and hearing counsel for
the inhabitants of *Westminster*) Ordered by this
Court that 58*l.* already levied upon the inhabit-
ants of *Westminster* part of the said fine be forth-
with brought into Court and that levies be made

for

for the residue thereof and that the inhabitants of the said liberty of *Westminster* have time to *plead* to the estreat until the first day of next Term And that the Sheriff of the county be admitted to deduct 12*d.* in the pound for levying the said sum of 58*l.*

Per Curiam.

[On the TREASURY REMEMBRANCE'S SIDE.]

1823.

Monday,
23d February.

Mode of procuring the discharge of a Crown debt, (arrear of taxes) and obtaining release from process where the debt is paid by the Crown debtor upon motion by the *Attorney-General*.

Ex parte BENNETT,

In the matter of The KING v. BENNETT.

IN this case *Shepherd* (for the *Attorney-General*) moved on the part of *Dinah Bennett*, whose name had been returned in the Schedule of defaulters annexed to the general process for non-payment of taxes in arrear, that she might be discharged from the sum due from and charged upon her in respect of such arrear, the Crown having been satisfied : whereupon

The Court made the usual

Order (a) for discharging
the Arrear.

(a) *The terms of the Order are as follow :*

Among the Orders, &c.

GRAY'S INN HALL,

Monday, 24th February.

Cinque Ports,
Kent.

} WHEREAS in the Great Roll of the
57th year of King Geo. 3. in "*Adhuc*

18 10 Item

Item Kent" (a) amongst other things is contained as follows viz. 3l. 11s. 6d. of *Dinah Bennett* of the Town of *Faversham* in the County of *Kent* assessed taxes for one year from the 5th day of *April* 1815 (b) as is contained in a Schedule on the *King's Remembrancer's Side* Now upon the motion of Mr. *Attorney-General* on behalf of the said *Dinah Bennett* informing the Court that the Crown is satisfied the amount of the said arrear it was therefore prayed that the said arrear may be now discharged Whereupon and upon reading a *constat* thereof from the Pipe Office and hearing the said *Attorney-General* IT IS this day ORDERED by the Court that the said arrear be and the same is hereby discharged accordingly And if &c. the Sheriff &c.

By the Court.

(a) The description of the charge in the great roll of the Pipe.

(b) The mode of describing the annual arrear of assessed taxes due from the subject to the Crown.

The KING v. WILLIAM BELL.

The KING v. JOHN SHACKLE.

1823.

Tuesday,
25th February.

[On an Extent in Chief in the Second Degree.]

Distinction between extent in aid and extent in chief in the second degree.

The statute of the 57th of Geo. 3., does not apply to extents in chief in the second degree. Therefore the Crown may proceed by extent to recover a debt due from a person indebted to the Crown debtor, (a collector of taxes) who had received and misapplied the Crown's money, although he be not a debtor to the Crown within the 4th section of that statute.

Neither does the recent rule of Court respecting extents in aid, apply to extents in chief in the second degree.

It is not necessary in the affidavit made for obtaining a *Barbui's fiat* for such an extent, in such a case, that there should be any averment of the insolvency of the Crown debtor, or any fact stated from which it may be inferred.

Nor is it necessary in such a case that collusion should be negatived.

The protection of parishes from reassessment is an object of the care of the Court; and the necessity of process of extent in the second degree for that purpose, where a collector is become defaulter, is a strong ground for granting the *fiat*: and the existing liability of the parish is consequently no answer to the objection of the Crown debt not being in danger.

IN the preceding term *Tindal* obtained a rule calling on his Majesty's *Attorney-General* to shew cause why the extent which had been issued in this case against the Defendant *John Shackle* (termed by the Counsel for the assignees of *Shackle* an extent in aid), should not be set aside.

An extent in chief had been issued on the 27th of *November* against *John Bell* who was a collector of taxes, at the instance of the Solicitor of the Board, for money received by him from the inhabitants within his ward. The *fiat* had been granted on an affidavit made by the clerk to the Solicitor for the affairs of taxes, stating in substance that *Bell* as collector of the rates and duties on houses (&c.) and other parliamentary assessed taxes within and for the ward of *Petty France*, in the liberty of *Westminster*, for the year 1821, and ended the 5th day of *April*, 1822, was indebted to his Majesty in the sum of 2,500*l.* arising from the rates and duties aforesaid, collected and received by him, of and from the several inhabitants

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of the said ward, and not paid by him to the *Receiver-General* of the county of *Middlesex*, or to his Deputy or otherwise for his Majesty's use, as admitted by the said *William Bell* to the Deponent on the 27th day of *November*, instant. And the Deponent further said, "that the said *William Bell* is by trade a haberdasher, and has declared to Deponent that he hath converted the said sum of 2,500*l.* to his own use, and is unable to pay the same, by reason whereof and of the facts above deposed, the said sum of 2,500*l.* so due and owing by the said *William Bell* to his said Majesty is in danger of being lost, unless a more speedy course than the ordinary method of proceeding be forthwith had and taken to recover the said debt."

Under the extent against *Bell*, an inquisition was held, by which it was found that *John Shackle* was indebted to *Bell* on the day of taking the inquisition in the sum of 2,500*l.*, under and by virtue of a judgment obtained by *Bell* in the Court of *King's Bench* in *Easter Term* 3 *Geo. 4.*, which said debt the Sheriff had seized (&c.)

An extent was thereupon issued against *Shackle*. He having been declared a bankrupt, his assignees appeared, and claimed, and pleaded to the inquisition. It was on their behalf that the proceedings against *Shackle* under the extent against *Bell* were now sought to be quashed by this motion.

In support of the application, an affidavit made

by the bankrupt was filed, stating that a commission of bankrupt was issued against him on the 22d of *November* last, under which he was duly found and declared bankrupt, and that a provisional assignment was executed (&c.) on the 3d of *December*, on which day possession was taken of his stock in trade, goods and effects, under a commissioner's warrant.

That for some time previous to his bankruptcy, the Deponent had various transactions in bills of exchange with *Bell* for their mutual accommodation.

That in *June* last, there being an unsettled account between them, on which an unliquidated balance appeared to be due from *Shackle* to *Bell*, *Bell* prevailed on *Shackle* to execute a warrant of attorney for 3,000*l*.

That on the 11th of *November*, an execution was issued against *Shackle* on that warrant of attorney by *Bell*, upon which judgment had been entered up for 3,005*l*. 10*s*., and a levy made.

That soon after the commission of bankruptcy had been issued against *Shackle*, the Solicitor for the petitioning creditors called upon *Bell's* attorneys and informed them of the commission having issued previous to the issuing of the execution, and proposed that proceedings should be stayed upon the execution, for the purpose of enabling
Shackle

Shackle to make some arrangement with his creditors; but

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That on the 29th of *November*, possession was taken of the Deponent's effects under this extent.

The Deponent concluded his affidavit by stating that from all the circumstances he verily believed that *Bell*, finding he could not succeed in obtaining a preference over the other creditors of the Deponent by means of the said execution, himself procured the extent (on which &c.) to be issued against him by voluntarily making the declaration stated in the affidavit made to found the *fiat* for that process, to have been made by *Bell*, and that such declarations were not true in fact, but were made solely for the purpose of obtaining an extent against himself, in order to form a ground for the subsequent extent against the Deponent. And that the Deponent had been informed (as he believed the truth was), that *Bell* had actually paid to the Crown a sum exceeding 1,200*l.* in part of the debt stated to be due and owing from him to the Crown.

On moving for the rule which had been obtained in this case, it had been urged that the extent had been unduly obtained, for the purpose of procuring for the Crown debtor, *Bell*, an unjust precedence in the payment out of the bankrupt's estate of the debt alleged to be due to him from *Shackle* in preference to the other creditors.

The

The principal objection taken to the proceeding was, that being an extent against *Shackle*, the debtor of *Bell*, in aid of *Bell*, *Bell* was not such a debtor to the Crown as to be entitled, since the late act of parliament (*a*), to avail himself of the Crown process.

It was also insisted as a practical objection to the proceeding, that the original affidavit of the clerk to the Solicitor for the affairs of taxes was not sufficient to ground the *fiat* for the extent in the first instance, the Deponent not having observed the rules of practice in such cases; which require that it should not only be positively averred that the Deponent believes the Crown debtor to be insolvent, but that some act should be stated upon which such belief is founded,—citing for that proposition the cases of the *King v. Enderupp* (*b*), the *King v. Jans vel Smith* (*c*); and the *King* (in aid of *Horn*) *v. Rippon* (*d*), and they referred to Mr. *West's* Treatise on the Law of Extents (*e*). That omission, it was contended, had destroyed the very foundation of this extent, and was fatal to all the subsequent proceedings which could not therefore be now supported.

It was further insisted that by the late rule of Court (*f*), it had become necessary to aver by

(a) 57 Geo. 3. ch. 117. Sect. 4.

(b) Bonh. 234.

(c) Ibid. 300.

(d) *Ante*, Vol. III. p. 398.

(e) Page 53. *et seq.*

(f) *Vide ante*, Reg. Gen. p. 160.

affidavit that without the extent against *Shackle*, *Bell* could not pay the Crown debt.

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It was also urged that under the circumstances of this case there ought to have been an affidavit negating collusion.

The *Attorney-General* now shewed cause against the rule. He professed to appear not for *Bell*, in whose aid the second extent had been assumed to have issued against *Shackle*, but for the Crown, and he particularly pressed upon the consideration of the Court, that the proceeding which was the subject-matter of the present application, and was sought to be set aside, was not an extent in aid, but an extent in chief in the second degree; and that it had been prosecuted wholly on the part of the Crown for the recovery of the debt due from *Bell* to the King. That consideration, he submitted, placed the present proceeding in a very different view, as neither the recent act of parliament, 57 Geo. 3. ch. 117., nor the still more recent rule of Court (a), (both of which had been designed to check, under certain circumstances, the too frequent resort to extents in aid for mere private ends, and the too ready mode of obtaining the *fiat* for the process,) could be applied to the impugnement of the proceeding in this instance. The same circumstance—that this process was in fact sued out on the part of the Crown—the *Attorney-General* contended, rendered it unnecessary to

(a) *Vide ante*, Reg. Gen. p. 160.

make

make any negative statement of collusion in the affidavit. The money which had been recovered under this extent would not be received by *Bell*, but would be wholly retained by the Crown in satisfaction of the Crown debt, the object of the proceeding being the security and satisfaction of the Crown, and to protect the inhabitants of the parish from a reassessment which might be the consequence of *Bell's* insufficiency, and that was an object which this Court always promoted and encouraged.

As to the objection founded on the terms of the affidavit, it was insisted that no advantage could be taken by the assignees of *Shackle* as to the extent against him of any deficiency of statement in the affidavit made to found the extent against *Bell*, the affidavit which had been made in the case of the extent against *Shackle* being free from any such deficiency; and the present application being not to set aside the extent against *Bell*, but the process against *Shackle*. He also urged, that this being a proceeding on the part of the Crown against a collector of the revenue, the affidavit was quite sufficient, for that it was not necessary in such a case to state any act of insolvency, nor even the fact of insolvency generally, where an act of embezzlement or misappropriation of the Crown money was stated, as there had been in the affidavit which had been made in this case.

Pollock, in support of the rule, denied that there existed in principle or in practice any such distinction

tion as had been attempted to be set up between an extent in aid and an extent in chief in the second degree: and he urged that if any such distinction were now to be established, it would furnish an easy recipe for getting rid of the wholesome restraints which had been of late imposed by the Legislature and the Court, on the undue use of the process of extent in aid, by converting every such proceeding into an extent in chief in the second degree, and that in a case where there did not appear to be any necessity for the process, as the parish was still liable, and consequently the Crown's debt was not in danger.

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He insisted on the objections to the extent which have been already stated, and submitted that they had neither been answered nor obviated by the arguments urged in opposition to the rule.

The *Attorney-General* replied.

RICHARDS, *Lord Chief Baron*.—We must treat this application as being, what it is, an attempt to set aside the extent which has been issued against *Shackle*, founded principally on objections raised to the extent against *Bell*, upon which that proceeding was resorted to. As the *Attorney-General* has stated, the second extent is not an extent in aid, but an extent in chief in the second degree. It is a proceeding in fact and *in fact* issued originally hostilely by the Crown against *Bell* in the first instance,

stance, and then against *Shackle*, to recover from
Shackle the debt due to *Bell*, (who, it must be re-
 membered, was a collector of taxes,) to be applied
 when recovered in payment as far as it might go of
 the debt due from *Bell* to the Crown, for money
 actually received by him from the parish for the
 use of the Crown. That is what we call in this
 Court an extent in chief in the second degree.
 Being so, the objection of collusion is put at once
 entirely out of the question, if there had been any
 thing in it. The objections in point of form apply
 wholly to the affidavit made to found the *fiat* for
 the extent against *Bell*, and whatever force there
 might have been urged as against that extent, we
 cannot consider them on the present application.
 The main objections were, that that affidavit was
 insufficient, because it had not been stated that *Bell*
 was in insolvent circumstances, and that no fact
 had been averred from which his insolvency could
 be inferred. Now although it may not be neces-
 sary to give any opinion upon that formal objec-
 tion on the present occasion, I have no hesitation
 in saying that I am perfectly satisfied that in point
 of law and practice the allegations in the affidavit
 are amply sufficient to authorize the *fiat* for the
 extent against *Bell*. It is stated that he had re-
 ceived and had misapplied the money collected
 from the parish, by converting it to his own use,
 for the use of the Crown. That alone has always
 been considered sufficient ground for the issuing
 of an extent. But be that as it may, the extent
 against *Bell* is still in force, and cannot now be set
 aside

aside upon this application. The motion is in truth founded upon the invalidity of another extent which has not yet been impeached, upon the ground of an alleged irregularity which has not yet been formally objected to it. Under that extent an inquisition has been taken by which the debt due from *Shackle* to *Bell* has been found, and is now upon record. The proceedings against him at least are regular. How then can we set them aside upon objections alleged to exist as to the original extent against *Bell*, for which however, if we were now considering those objections in the due course, I do not think there is the slightest foundation?

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I must repeat, that we should bear in mind throughout that these extents are *bond fide* proceedings on the part of the Crown, sanctioned by the King's Law Officers, for the recovery of the Crown revenue against a responsible minister employed in its collection. To such proceedings the act of parliament was never meant to apply, nor are they in the most distant manner affected by its provisions.

It is necessary that we should notice what has been said respecting the existing liability of the parishioners, and the consequent safety of the Crown debt. I will only say, that it is impossible that we should take that into our consideration upon the occasion of this motion. It cannot properly form any part of the present inquiry.

quity. The Crown may proceed against its revenue officers for the recovery of money received by them for the King's use as may be thought most adviseable, according to the discretion of those whose duty it is to institute the necessary proceedings. But if it were not so, it would still be the duty of this Court to protect the inhabitants of a district, who have paid the taxes to a collector, from the deficiencies of the officers of the Crown, who have received them, wherever their property of any description can be rendered available for that purpose.

On every ground therefore, and in every view of this case, I have no hesitation or difficulty in saying that this rule ought to be discharged.

GRAHAM, Baron.—It is quite clear that neither the act of the 57th of Geo. 3., nor our recent rule has any application to such proceedings as the present, where the Crown process is resorted to wholly and truly on the part of the Crown, on the effect would be to disarm the Crown of its most efficient means in this Court of recovering its public rights and duties, which but for the speedy and effectual measure of our strong process would often be irrecoverably lost. It is one of the most available effects of the proceeding by extent, that under it the Crown can seize by ulterior process the debts due to its debtor before it resorts to his other property.

It would be absurd in the case of an adverse extent, which the present clearly is, to require a denial of collusion. This is in all respects a *bond fide* extent in chief in the second degree, and an adverse proceeding as between the Crown and the party against whom the Crown is entitled to recover its debt by every possible means.

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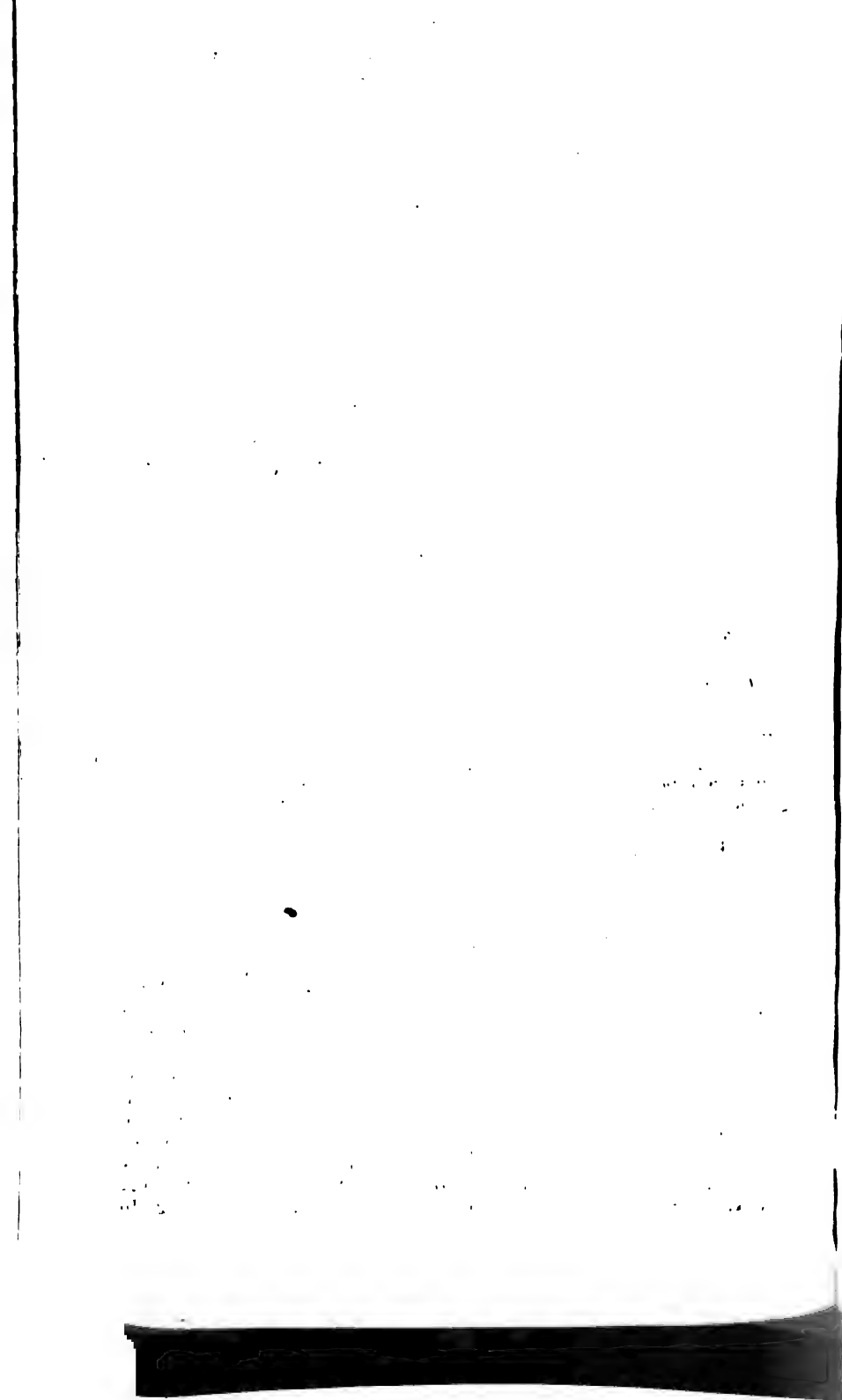
It is said that the extent against *Shackle* is without foundation, because the original extent against *Bell* upon which it is founded was not properly obtained, inasmuch as that was also founded upon insufficient materials. That appears to me to be a novel objection, and it is one which I certainly cannot understand as a valid objection to the second extent. I however think, with my *Lord Chief Baron*, that the original extent was well founded. It cannot be necessary to state the insolvency of the party under the circumstances of the original extent against *Bell*, and it is never required in practice where there are other stronger grounds, such as are stated in the affidavit in that case. The statute of the 33d of *Hen. 8.* leaves the issuing of the extent wholly to the discretion of the *Barons*, who are thereby constituted the proper judges both of the necessity for the process, and the sufficiency of the matter on which the *fiat* is granted; the great object of the recourse to the prerogative writ being expedition in cases of urgent emergency. That urgency is necessarily a question for the consideration of the *Baron*. In the present instance, I am clearly of
opinion

opinion that there existed such an emergency as rendered the Crown process necessary, and that the *fiat* for the original extent was well founded.

But to the issuing of the second extent against *Shackle*, there is no such objection raised. If that objection had been taken to it, I would ask, can there be a more decisive fact stated from which the party's insolvency must be inferred (if any were necessary to be raised, which I deny), than that the party has misapplied money belonging to the Crown received by him in his capacity of collector of taxes, and converted it to his own use, coupled with the averment immediately following, that he is unable to pay the money so converted, and that the Crown's debt is thereby in danger of being lost, "unless a more speedy course than the ordinary method of proceeding be forthwith taken to recover the said debt?" That statement surely affords a tolerably strong proof of embarrassed circumstances, if any were wanted to be averred for the purpose of founding this extent and justifying the *fiat* on which it was issued.

I am anxious however to reject that ground altogether, lest I should be thought to entertain an opinion that some such averment was necessary, which I utterly deny. Is the Crown to lose its remedy—the *festinum remedium* of the prerogative—in a case of urgent danger, from some supposed necessity that the affairs of an embarrassed collector of revenue must first be minutely inquired into, before
this





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Ib.

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ation bond were assigned in the replication to a plea of performance on *acire facias*, in that the defendant had not exported, &c. and that he had unshipped and re-landed, &c.

It was proved that the goods, (spirits), had been in fact, shipped and carried out to the place of the vessel's destination—that they were not landed there, but were in part used at that place, and on the homeward voyage by the master and crew of the vessel, and that the remainder was brought home into the London Docks, where it was emptied out of a beer-cask (into which it had been drawn off, out of the export cask) into the water. There was no evidence of fraud.

Quere,—Whether not a fair exportation of the spirits, and so far a literal performance of the condition of the bond, but held to be an unshipping and re-landing in Great Britain, and therefore a literal breach of the condition, and sufficient to support a verdict obtained by the Crown. *Graham Baron, dub.*
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Held, that the legislature, by the sixth article of the Act of union, with reference to the treaty on which it was founded, intended to place both countries on an equal footing of advantage and disadvantage, in respect of articles of the manufacture and trade of either, when exported from one to the other—that such intention is sufficiently expressed in the words of the statute to enable the Court to give effect to it, and that the statute must be construed as having established a perfect reciprocity of advantage and consolidation of interests in respect of the commercial intercourse of the two countries, and to have placed them both, in all respects, on a level as to their mutual traffic and dealing, by the effect of the imposition of countervailing duties, and by the virtual re-enactment of the previous acts of parliament, regulating the trade in British produce. Therefore (*exempli gratia*) when spirits distilled and made in Ireland, are imported from thence into England, they become British Spirits, and are entitled, as such, to all the advantages of, and are liable to all the imposts on, British Spirits, existing at the time of the act of union: and they are also subject to all

all the excise regulations affecting British spirits, as, for instance, to the provisions of the 26th Geo. III. ch. 73.

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57 Geo. III. ch. 117.

2. An obligor to the crown by bond conditioned to sell all such sugars as shall be delivered to him as agent, for the sale and disposal of certain sugars, and to account for and pay over, the produce of the sale of the said sugars, to, &c. may sue out a writ of extent in aid, under the proviso in the 57 Geo. III. c. 117. as upon a debt due from him to the crown, being the balance of monies received by him, betwixt the date of his appointment, and the time of issuing the extent, arising from the sale of sugars delivered to him after his appointment, and previous to the date of the bond.

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bequest for the benefit of each to the amount of one half; and therefore, as to one moiety, chargeable to the highest, and as to the other, to the lowest duty.

The Attorney General v. Barchus and Wife, and Another - - - 548

5 Geo. III. ch. 45.

4. The *depending stock* of a tanner, with respect to which the regulations of the 5th of Geo. III. c. 43. apply, is not merely the stock of hides and skins, &c. which have been taken out of the wooze, and have been already weighed and marked by the inferior officer of Excise, but the whole of the stock which has been taken out of the wooze. Therefore, the tanner is liable to the penalty, for not providing scales and weights, and for not assisting the officers of excise in not only re-weighing the stock already weighed by the officer, but in so providing scales and weights for re-weighing, and in examining any part of his stock of hides and skins taken out of the wooze, and being on his premises from that time until the time when they might legally be removed.

The Attorney General v. Bevington and Another - - - - 322

10 & 11 Wm. & Mary, ch. 21—24
Geo. III. ch. 41—58 Geo. III. ch. 65.

5. Tar distillers, necessarily making tar-acid or acetous acid, in the progress of their manufacture, are therefore to be taken to be vinegar makers, within the 6th sect. of the 24 Geo. III. c. 56.: and they are thereby subjected, as such, to all the excise regulations made by the statutes passed in respect of the makers of vinegar, and are not protected by the proviso in that section; and consequently are liable to an information for penalties for not giving

ing the usual notice to the excise, required by the 14th sect. of the 10th and 11th of Wm. c. 21.

The Attorney General v. Houlgrave and Another 217

6. 49 Geo. III. ch. 121.

(*Of Bankrupts.*)

Vide BANKRUPT, No. 2.

7. 57 Geo. III. ch. 117.

(*Of Extents in Aid.*)

Vide EXTENT, No. 1.

8. 25 Geo. III. ch. 25.

(*Sale of Crown Debtor's Lands.*)

Vide JURISDICTION, No. 3.

CONSTRUCTION

(*Of Covenant.*)

Vide COVENANT.

(*Of Rule of Court.*)

Vide EXTENT, No. 2.

CONTEMPT.

(*Of Court.*)

(*Consequences of.*)

The publication of what passed on the trial of some of several prisoners indicted for the same offence at a Court of general Gaol-delivery, after an order had been promulgated by the Court prohibiting such publication until all the trials should be concluded, is a contempt of Court, and punishable by imprisonment or fine; and if the offending party being summoned to attend the Court to answer for the contempt, by order issued for that

purpose, should not appear, the Court has power to impose a fine on him in his absence.

Service of such an order, by leaving it with the servant of the party, (who was printer, publisher, and sole proprietor of a newspaper,) at the newspaper office, is good service.

The Court of general Gaol-delivery has jurisdiction to make such orders: and the Court of Exchequer refused to grant a rule nisi for the discharge of a party from such a fine, on an application made to them for that purpose, after it had been estreated into the Exchequer, on the ground of the illegality of the proceeding; holding that the fine might legally be imposed, and that the present was a fit case for the imposition of such a fine.

In Re Clement.

(*What documents necessary to bring a party into contempt.*)

Vide CERTIFICATE. (*Of Warden.*)

COSTS.

(*Where ordered to be paid as the terms of granting an Injunction.*)

1. Where an injunction had been granted to restrain a Plaintiff from proceeding in an action at law, a decree of reference to take an account having been obtained on a creditor's bill against executors before action brought, and the Defendant had not apprised the Plaintiff of the decree at the time of being served with process, and had not given notice of such decree, or of the application for the injunction after notice of trial, the Defendant was ordered to pay to the Plaintiff, as the terms on which the injunction was granted, all the costs of the proceedings at law, up to the time of the service of notice of the decree,



defendant, who had put in bail, whom he had insufficiently described, so that time was necessarily given for furnishing a better description, during which interval such further description was not given, nor was any attempt afterwards made to justify the Court to set aside the proceedings on the assignment of the bond; the costs of an application to set aside proceedings were ordered to abide the event.

Richardson v. Hodgson - - - 634

7. On a rule to shew cause why an attachment should not issue against the former attornies of a Defendant, for not delivering in their bill of costs to the Defendant's new attornies, illness having been assigned as the reason for disobeying the order of the Court, and the bill having been in the mean time delivered in, the Court discharged it without costs.

Gripper v. Cole - - - - 593

8. A too general description of bail, although a sufficient ground for successfully opposing their justification, is not in itself enough to call upon the Court, to fix the Defendant with the costs of the opposition at the time, but the Court will order the consideration of costs to be reserved till the bail justify.

Richardson v. Hodgson - - - 379

9. Where the Defendant in a tithe cause submits to a part of the Plaintiff's demand, the Court will, on motion for that purpose on the part of the Defendant, refer it to the Master, in any stage of the proceedings, to ascertain what is due, and to tax the costs, the Defendant undertaking to pay the amount without prejudice to any other question in the cause.

Lowe v. Firkins - - - - 453

10. Defendants in a tithe cause made Plaintiffs at law, for the purpose of trying a feigned issue, directed

to assist the Court in determining the question of modus raised by the answer, succeeding on several occasions in obtaining verdicts, which were afterwards successively set aside as not satisfactory to the Court of Equity and new trials granted, the last being taken by the Plaintiff at law by consent, each party to pay his own costs at law and in equity: Bill dismissed on further directions without costs.

Williamson v. Thompson and others

745

_____ v. *Lord Lonsdale* - *Ib.*

_____ v. *Hutton* - - - *Ib.*

11. So, where the Defendant in equity (Plaintiff at law) after two trials of the issue, on the third reformed the issue, and thereupon the Defendant at law (Plaintiff in equity) obtained on petition an order, that the issue should be taken as confessed after the cause had been carried down and notice of trial given, the bill was dismissed without costs, on the ground that the Plaintiff in equity had been misled by the Record down to the last moment, the Court holding that the defence should be so stated in the answer, as that the Plaintiff might be fully and accurately aware of the whole of the matter really intended to be ultimately relied on, in resistance of his demand in the suit in equity.

Ib.

12. A rule obtained for discharging a prisoner, on the ground of his having been charged in execution (by mistake), for 103*l.* Instead of 100*l.* 5*s.* in consequence of an error in stating the true sum, which made the amount of the debt and costs on the Judgment Roll; was discharged with costs.

Plindell v. Fairman - - - - 410

Et vide AMENDMENT, No. 1.

BAIL, *passim.*

PRACTICE (at Law), *passim.*

13. Where,

here, after several trials at law,
 ry ultimately found a verdict
 modus (a district modus)
 erally and as laid, but with
 tion of certain lands with-
 rict, not describing what
 whose occupation they
 e *postea* was returned
 a certificate of the
 was dismissed with-

erson . . . 745
 onsdule . . . *Ib.*
 . . . *Ib.*

a Court of
 to establish
 o overturn
 your, the
 allowed;
 are es-
 of lay-
 state

21
 b.

Held to be a question of so much
 doubt, at least, as to be good cause
 for not dissolving an injunction
 obtained to restrain parties, pro-
 ceeding in ejectment—doubt, in
 matters of law, being sufficient
 ground in equity for continuing
 an injunction once granted.

well v. Ward 8
 es in courts of equity are not
 ed by the opinion of courts of
 to which cases are sent for
 opinion and judgment.

Ib.

lease—whether, in order to enforce
 the performance of such a covenant
 in equity, it is not necessary that
 the party claiming to be entitled
 to the benefit of the renewal, should
 not be able to shew that a claim
 was duly made within twelve
 months after the death of the cestui
 que vie, who died first; although
 there were no express provisions in
 the lease that the lessee should then
 give notice, or be precluded?—or
 whether the covenant may not be
 enforced after a claim of renewal,
 made within twelve months after
 the expiration of the second life,
 where the party beneficially en-
 titled to the right of renewal stated,
 in his bill to compel performance
 of the covenant, the temporary loss
 of the lease, and his consequent
 ignorance of the covenant, as the
 reason why application was not
 made within twelve months after
 the dropping of the first life?

COUNT.

Law, passim.

BTOR.

CUSTODY.

(In what case the Court will discharge a prisoner detained in custody on an information at the suit of the Attorney General.)

Vide ARREST.

CUSTOMS.

Vide BOND, (to the Crown.)
CONSTRUCTION OF STATUTES.

D.

DAMAGES.

(Where special loss may be given in evidence, though no special damage be laid in the count.)

Vide EVIDENCE, No 8.

DECLARATION.

Vide PLEADING AT LAW, *passim*.

DEED.

Vide EVIDENCE, No 18.

DELAY.

Vide LACHES.

DEMURRER.

(At Law.)

Vide EVIDENCE.

PLEADING AT LAW, *passim*.
PRACTICE AT LAW, *passim*.

(In Equity.)

Vide INJUNCTION.

PLEADING IN EQUITY.
PRACTICE IN EQUITY.

DISCHARGE

(Of Prisoner.)

Vide ARREST.

(Of Recognizance.)

Vide RECOGNIZANCE, No 1.

(Of Arrears of Crown Debt.)

Mode of procuring.

Vide PRACTICE.—(REVENUE.)

DISMISSAL

(Of Bill for want of prosecution how avoided.)

Vide PRACTICE IN EQUITY. Nos 12, 13, 14.

(Of Bill, on further directions.)

Vide COSTS, Nos 10, 11, 13.

DISSOLUTION

(Of Partnership.)

Vide PARTNER.



dence of loss of business by plaintiff's wife in her trade of milliner, held admissible in such a case as evidence of general damage, where no special damage on that ground was laid in the declaration, nor any customers named, nor any averment of her business introduced.

Ward v. Smith - - - - - 19

4. In an action for a libel on the plaintiff tending to injure his credit and reputation in his profession and business of an attorney, and defamatory of him in his said profession and business: it was held to be sufficient evidence of the plaintiff being an attorney, that it was proved by the book of admissions produced by the proper officer, and that he practised as an attorney.

Jones v. Stevens - - - - - 235

5. It was also decided to be no objection to maintaining such an action, that it appeared in evidence that during the time of the grievances stated in the declaration, the plaintiff had omitted to take out his certificate as required by the 37 Geo. 3. c. 90. for more than a year, but that he might still sue as an attorney for damages, in consequence of a libel imputing improper conduct to him in his character of attorney.

Ib.

6. One writ produced with three declarations and three rules to plead in the same suit, is sufficient evidence of three actions having been commenced by such process.

Ib.

7. Statements made in a libel have the effect of dispensing with proof on the part of a plaintiff of facts so stated, if they become necessary to support the plaintiff's case.

Ib.

8. General evidence of the plaintiff's

bad character and ill-repute in his business as a practising attorney, cannot be admitted either to contradict the allegation in the declaration, that the plaintiff during, &c. exercised and carried on the business of an attorney with great credit and reputation, with a view to mitigate damages on the general issue, or in support of averments in the defendant's pleas pleaded by way of justification, that the plaintiff was a disreputable professor and practitioner in the law. The case of the *Earl of Leicester v. Walter*, (2 Campb. N. P. C.) denied by this court to be law.

Ib.

9. Possession of a steward of documents, as leases, &c. held to be the possession of his employer, and therefore not affected by a subpoena *duces tecum* served on the steward to produce them on the part of a defendant on the trial of an action at law, in which his employer was plaintiff.

Earl of Falmouth v. Moore, admors. &c. - - - - - 15

10. The steward may, however, be examined as a witness to give evidence of the existence and contents of a particular document, if due notice have been given to produce it specifically.

Ib.

11. A Steward is not, like the legal adviser of a party, a privileged person protected by his relative situation from disclosure (to a certain extent, at least, as where the employer would be compellable himself to discover the matter by answer to a bill in Equity) of his knowledge of his employer's affairs, and the existence and contents of muniments, on the ground of the necessary confidence unavoidably reposed in him, and the immediate communication between them;

them, as analogous with the relative situation and intercourse of attorney and client.

Earl of Falmouth v. Moss, administrator, &c. - - - - 455

12. *Sed quare* how far the liability of such a person to such an examination extends: and whether there may not be cases wherein his situation would privilege necessary communications, and his knowledge acquired as steward of his employer, and protect such communications and knowledge?

Ib.

13. As to what length of time, and what species of adverse possession, is sufficient to raise a presumption of grant in favour of the right to a good title in a register county; and what is insufficient to infer fraud, and what effect deeds under circumstances affecting their construction should have as evidence—see the facts of the case.

Dee den. Bealand v. Hirst - 475

14. It is not necessary to give evidence to prove the truth of averments, in a declaration in an action for libel, according with statements in the publication.

Bagnall v. Underwood - - 621

15. In an action for a libel on the plaintiff, who alleged in his declaration that he held an office of trust and confidence, to wit, the office of overseer of a common field, and that the defendant composed, &c. of and concerning the plaintiff, and of and concerning his conduct in his said office of, (&c.) a libel, part of which was that the committee (for managing the concerns of the said field) think proper to satisfy the inhabitants, &c. respecting the different charges laid against the plaintiff the late overseer, &c. for embezzlement, or not giving a proper account of the public property; the plaintiff put in the libel, and proved publication, &c., and that

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he was overseer. It appeared from the testimony of his own witnesses that he was not entrusted by the committee, as such overseer, with the receipt of money, or that any particular confidence was necessarily reposed in him in virtue of his employment, which appeared to be a somewhat humble one. It was objected that he should have proved that it was an office of trust and confidence as alleged, and that therefore the action could not be supported: Held, that as the libel in its terms imported that it was an office of trust and confidence, and charged a fraudulent abuse of it, it was therefore not necessary to give any proof of it in support of the allegation in the declaration.

Bagnall v. Underwood - - - 621

A nonsuit, which had been directed on the ground of that averment requiring proof, set aside, and a new trial granted.

Ib.

16. Evidence given, tending to shew that the situation was not one of trust and confidence, does not furnish ground for directing a nonsuit.

Ib.

17. Where the prisoner was indicted for forging a power of attorney to transfer stock, to which he had affixed his own name and that of a co-trustee, in whose names the stock stood in the Bank-books, the co-trustee (who on hearing of the transaction had apprised the Bank of the matter by letter, and had thereby prevented the transfer) is admissible and competent as a witness to prove the forgery.

Deed.

18. It is not necessary that a power of attorney given by deed should be revoked by deed.

Vide PARTNERS.

3 H

19. The

19. The objection to the admissibility in evidence of the testimony of a witness so circumstanced as to give rise to these questions, having been considered by his counsel of sufficient weight to found an application to the king for a pardon—the points were referred to the twelve judges by the lord chancellor: and counsel were heard on behalf of the convict as matter of grace, granted upon his petition to the lord chief justice, praying to be permitted to avail himself of that advantage.

Rex (on prosecution of Bank) v. Wait
520

20. The affidavit of defendant to found the fiat for an extent, held not to be legal evidence to lay before the jury in support of the inquisition taken thereupon.

Rex (in aid of Hill and Others) v. Hornblower - - - - - 29

Insufficiency of Proof.

21. A defence to a bill for tithes of prescription in *non decimando* on the ground of the lands in respect of which the demand is made, having formerly belonged to a religious house, cannot be supported unless the lands can be shewn to have belonged to the religious house before time of legal memory. It is not sufficient to prove that the lands were in the possession of the religious house at the time of the dissolution of monasteries.

Markham v. Smyth, Bart. - - - 126

22. *Vide* EXTENT, N° 6.

EXCEPTIONS

(Bill of.)

How waived after allowance.

A party bringing a writ of error and thus removing the record before he has procured the judge's seal to a bill of exceptions tendered by him at the trial of his cause on the rejection of evidence offered by him, waives by so doing the bill of exceptions allowed by the judge.

Dillon, Esq. v. Parker (in Error.)
100

Quere, Within what time the party ought to procure the judge's seal to a bill of exceptions?

1b.

(To Master's Certificate.)

Vide PRACTICE (in Equity) N° 4.

(To Answer.)

Vide PRACTICE (in Equity.)

EXCISE

(Duties of.)

Vide CONSTRUCTION (of Statutes.)

EXECUTION,

Vide COSTS, N° 12.
FALSE RETURN,
EXTENT.

EXEMPTION

(From Tithes.)

How to be proved.

Vide EVIDENCE, N° 21.
PLEADING (in Equity,) N° 2.



Crown, being the balance of monies received by him between the date of his appointment and the time of issuing the extent arising from the sale of sugars delivered to him after his appointment, and previous to the date of the bond.

Rex, in aid, &c. v. Kynaston and Others, assignees, &c. - - - 598

GENERAL ORDER RESPECTING ISSUING EXTENTS IN AID.

10. On the motion of Mr. Attorney-General, IT IS ORDERED, that, from henceforth, no Fiat for an Extent *in Aid* shall be granted, unless the party applying for the same, or some person or persons on his behalf, shall make Affidavit, that "unless the Process of Extent for the debt due to him from his debtor be forthwith issued, the debt due to the Crown from the party applying will be in danger of being lost to the Crown."

Rule of Court, practice respecting 159
Vide AFFIDAVIT, (passim.)

INTEREST (of Money.)

FALSE RETURN.

FIAT.

PRACTICE (at Law.)

F.

FALSE RETURN

(What is not.)

1. An information in the nature of an action for a false return against a sheriff who had returned that he had scised the goods, &c. into the hands of his majesty, subject to certain prior executions, which return had the effect of depriving the Crown of the fruits of its preroga-

tive priority cannot be supported if the return should be substantially true, although it might be bad in point of law.

The proper course in such a case would be, to procure the return to be quashed by motion for that purpose.

A Court of Error will not overlook an objection appearing on the record and special verdict, even where the parties may have so bound themselves as not to be entitled to insist on the objection.

Giles v. The King - - - 594

2. Where the attorney of a judgment creditor delivered to the sheriff a writ of *feri facias* returnable on a day certain, with directions by letter, not to execute it till the return, unless another execution should come in, in the mean time, and afterwards sent in an *alias*, accompanied with the same directions; and the sheriff, upon another execution coming in, issued warrants on, and executed both writs on the same day, giving precedence to the last execution, and satisfying that wholly, first, out of the money levied, and then paid over the remainder, in part satisfaction of the execution first delivered, and returned that payment and *nolle prosequi* as to the residue—it was held that the Plaintiff could not maintain an action against the sheriff for a false return: and that a nonsuit on that ground had been properly directed, the case being within the principle of *Kempland v. Macauley*, and not distinguishable in the circumstances.

Pringle v. Isaac, Esq. - - - 445

FEIGNED ISSUE.

Vide ISSUE (at Law.)



HUSBAND AND WIFE

(Duty on Legacy to—How apportioned.)

Vide CONSTRUCTION OF STATUTES,
No 3.

I.

IMPERTINENCE

(In Bill,)

What is.

Vide PRACTICE, (in Equity) No 2.

IMPORTATION,

Vide CONSTRUCTION (of Statutes.)

INFORMATION

(By Attorney-General.)

Vide AFFIDAVIT.

LIMITATIONS (Statutes of.)

PLEADING (at Law,) *passim*.

INJUNCTION.

1. Injunction granted to restrain a Plaintiff from proceeding in an action at law, a decree of reference to take an account having been obtained on a creditor's bill against executors before action brought.

The Defendant not having apprised the Plaintiff of the decree at the

time of being served with process, and not having given notice of such decree, or of this application, till after notice of trial, was ordered to pay to the Plaintiff, as the terms on which the injunction was granted, all the costs of the proceedings at law, up to the time of the service of notice of the decree, and the costs of the motion for the injunction.

Farlow (on part of self and Creditors of a deceased Debtor) v. Wilson and Another, Executors, &c. - 95

(Where continued.)

2. Where a question, raised upon a point of construction of covenant, was considered to be matter of much doubt, it was determined to be good cause against dissolving an injunction which had been obtained to restrain parties from proceeding further at law in an action of ejectment—doubt, in matter of law, being deemed sufficient ground in equity for constituting an injunction when once granted.

Maxwell and Others v. Ward - 3

(On what terms continued.)

3. An injunction, obtained to restrain execution after verdict at law, will not be continued, unless the Plaintiff (in equity) pay into Court the amount recovered at law, notwithstanding a rule have been obtained for a new trial which is yet undisposed of.

Austen v. Thomson - - - - 1

4. A vendee having purchased the interest of a remainder-man, and advanced him money to pay off a mortgage, under circumstances creating a probable lien, the Court restrained the tenant for life by injunction from proceeding, by ejectment at law, to recover the premises from the purchaser, who had been let into possession, on his advancing

advancing the mortgage money until the determination of a suit in equity, instituted by the vendee. *Ludlow v. Grayall* - - - 8

5. In shewing cause against a motion to dissolve an injunction, the Plaintiff cannot use any allegation in the bill, unless it be confessed in the Defendant's answer.

Murwell v. Ward - - - 14

(Where refused or dissolved.)

6. Where a Defendant in a suit, founded on charges of misconduct, for an account and a dissolution of the partnership and for an injunction to restrain him from receiving debts, drawing bills, &c. or further interfering in the partnership concern, denied or explained facts of appropriation to his own use of debts received by him from persons indebted to the concern, and alleged that he could not put in his answer to the bill because the Plaintiff had possessed himself of the partnership books, and carried them away from the partnership premises, the Court would not even grant the injunction, on the ground of the Plaintiff having acted improperly.

7. In refusing such an application, however, the Court did so expressly without prejudice to any future application.

Littlewood v. Caldwell - - - 97

7. An occupier of lands took a lease of the tithes, due from himself to a rector, at a rent reserved. The rent was afterwards assigned by the rector to another person who claimed to be paid the arrears. The lessee having also received notice of a further claim from grantees of annuities (previously charged on the tithes by the rector), who had, as such grantees, subsequently to the title of the rector's assignee, sued out a *fieri*

facias de bonis ecclesiasticis, against the rector, on a judgment obtained by them on their securities, filed a bill of interpleader against all the parties, and obtained injunctions on paying the rent due from him into Court. On the answers of the Defendants coming in, the priority of the several titles of the claimants being thereby clearly set out, and the rector disclaiming, the Court dissolved the injunction—holding, that in such a case they could not restrain the party who was shewn to have a preferable title, from proceeding to enforce it: or to decree that the parties should interplead in a case where the priority of right was so distinctly set forth by the answers.

Bowyer v. Pritchard, Clerk, and Others 103

If the case be not such as will support a bill of interpleader, the defendants should demur.

Ib.

8. Such a lease and assignment of part of the rector's ecclesiastical property, were held to be good: and not to be affected by an execution sued out against the rector, after the rent had been assigned.

Ib.

9. In an interpleading suit, one of the defendants' answers may be read against the others.

Ib.

10. The Court refused to grant a motion made *ex parte* to extend an injunction to stay trial, till two of three Defendants who had not appeared to the bill, and were in contempt, should have appeared and answered, observing that *non constat*, if they had been served with notice of the motion, that they might not have shewn that they had appeared, and cleared their contempts.

Higham v. Antwis and Others - 759

Vide LIEN.

INQUISITION.
Vide AFFIDAVIT, N^o 3.
EXTENT.

INSOLVENCY.
(Where averment of, not necessary in affidavit to found extent.)

Vide EXTENT, N^o 3.
What is not sufficient notice of insolvency to prevent a judgment creditor from suing out execution by bringing him within the 2d sect. of Geo. III. ch. 121. fixing him with previous knowledge.
Vide NOTICE, N^o 4.
INSOLVENT DEBTOR.
General order respecting 422

Vide PRACTICE AT LAW, N^o 7.

INTEREST.
(Of Money.)

Where sheriff's liable to pay interest to parties on balances in their hands.

Where a sheriff had retained for several years a sum of money in his hands, the balance of the produce of effects of a Crown debtor seized by him and sold under an extent, after the Crown debt had been satisfied, claiming himself a lien thereon for poundage, &c. the Court ordered that he should pay interest on the amount of such balance to the parties from whom he had withheld it, from the time when the Court had determined, on a former occasion, that the claim of the sheriff was unfounded, notwithstanding which determination

he had continued to keep the question before the Court; and that although the sheriff should not have made interest or any use or advantage of the money in the meantime, the Court proceeding wholly on the ground of the injury done to the party entitled to it.

The Court gave the party applying the costs of the application, but they refused to order the sheriff to pay the costs of former applications disposed of in respect of the same question.

Ex parte Villers - - - 575

INTEREST.

(In witness.)

Where not an objection to his competency.

Vide BARRISTERS, N^o 2, 17.

INTERPLEADER.

Vide INJUNCTION, N^o 7, 8, 10.

IRREGULARITY.

Where Ground for setting aside Proceedings.

Vide PRACTICE *(passim.)*

LACHES.
NOTICE.

Where not.

ISSUE.

(At Law.)

Directed to try an ancient composition for tithes in kind on the evidence of tithers.

Martham v. Smyth, Bart. and Others,
126

(*New trial of,*)

(*When and how to be moved,*)

Vide NEW TRIAL, No 3.

J.

JUDGMENT

(*Arrest of,*)

Vide ARREST (*of Judgment.*)

Where set aside,

Vide NOTICE, No 5.

JURAT

(*Of Affidavit,*)

Vide BAIL, No 3.

JURISDICTION

(*Of the House of Lords.*)

1. An order made by the Court of *Exchequer*, consequent upon a judgment of the barons, in the matter of an extent upon facts reported by the deputy remembrancer to the Court, on a reference to him, is not the subject-matter of an appeal to the *House of Lords*; because (*semble*) it is a proceeding

at law, and not in equity, and the House has no appellate jurisdiction in such cases, as they have in many of those substantive independent decretal orders which are from time to time pronounced by courts of equity.

Wall and Others, assignees of Bond and Others, v. the Attorney-General,
643

2. The proceeding by writ of extent, and all proceedings thereon, interlocutory and final, (*semble*) are proceedings at law; and, therefore, appealable from in the first instance to the Court of Error.

Ib.

3. The 25 *Geo. 3.* ch. 35. does not make the order of the Court to sell the real property of a Crown debtor an equitable proceeding, so as to subject it to the immediate appellate jurisdiction of the *House of Lords*.

(*The course of proceeding in such case, in order to save the advantage of an appeal,*)

4. To found an appeal to the *House of Lords*, the party failing must put his defence upon the record so as to obtain the judgment of the Court at law, upon which he may bring a writ of error, and he may then appeal from the judgment of the Court of Error to the *House of Lords*: or he should file an English bill (or bill in equity in the *Exchequer*) to establish his right against the Crown, when, if he do not obtain a decree in his favour, he may at once present a petition of appeal from the Court of Equity to the *House*.

Ib.

5. *Semble*, that a party entitled to proceed by motion made to a Court of Equity under the various statutes authorising such summary applications, is not thereby precluded from

from filing a bill in equity to obtain the same object, if with a view to saving his right of appeal, or for other reasons, it should be considered the more advisable course.

Quære, Whether, when a debt, originally on simple contract, recovered by Crown process, and brought into Court as part of the general fund which was the produce of sale of the lands of the Crown debtor, sold on motion under the 25th Geo. 3. ch. 35. can be considered to be proper money of the Crown, and to have been legally or equitably appropriated to the Crown on and from the confirmation of the Master's report finding the Crown entitled to a certain proportion of the fund from that time: in consideration of the debt due, and whether the Crown is entitled to the accumulation of the dividends, &c. on the amount from the same time? Or whether there can be any actual appropriation without the express direction of the Court?

Wall and Others, assignees of Bond and Others, v. the Attorney-General,
648

See OBSERVATIONS on this case, and reference to authorities, at the conclusion.

(Of the Exchequer.)

Instance of the exercise of the power of the barons to respite process issued in respect of fines imposed at the assizes upon inhabitants of towns, &c. on presentments when estreated into the Exchequer, upon summary application on reasonable grounds.

Mode of obtaining the order of the Court for that purpose.

Such orders will not ordinarily be made indefinitely, or until further order generally, but merely from term to term.

In re Inhabitants of City of Norwich,

JURY

(What matters properly left to them.)

If the agreement for a letting be delivered over, after signature, to the party interested, with an express verbal stipulation, that it is still to be subject to the landlord's being satisfied with the reference given him by the tenant, on the result of his inquiries, it seems it may be a proper question for the jury, to say, on an action for not performing the agreement,—whether, inquiry having been made, the answer given by the party referred to, was such as reasonably satisfied the condition; although the landlord declared that it was not satisfactory to him, and thereupon refused to let the tenant into possession, under the contract, on that ground.

Ward v. Smith 19

Vide BANKRUPT.

AFFIDAVIT, No 3. 8.

EVIDENCE, No 3.

NEW TRIAL.

JUSTIFICATION

(Of Bail.)

Vide BAIL, *passim*

(Plea of—to Actions for Libel.)

Vide PLEADING AT LAW, (*passim*.)

(Evidence in support of.)

Vide EVIDENCE.

K.

KNOWLEDGE

(Of Facts,)

*Who privileged from disclosing as a Witness, and who not?**Vide EVIDENCE, Nos 9, 10, 11, 12.*

L.

LACHES.

Applications to set aside service of process on the ground of irregularity, must be made at the earliest possible time or the delay must be satisfactorily accounted for. The party objecting is not in such case entitled to delay his motion till a further step be taken in the cause.

*Monday v. Sear - - - - 122**Vide INJUNCTION, No 1.*

LANDLORD AND TENANT,

*Vide LEASE.**NOTICE, No 5.*

LEASE

(Covenant for Renewal of,)

*Where construction of doubtful, and the consequence in Equity,**Vide COVENANT (construction of) — INJUNCTION, No 7.*

LEGACY

(Duty on)

*How proportioned,**Vide CONSTRUCTION OF STATUTES.*

LIBEL

(Pleading in actions for,)

Vide PLEADING AT LAW, Nos 1, 2, 3.

(Evidence in,)

Vide EVIDENCE, Nos 4, 5, 7, 8, 14.

LIEN

(Equitable.)

A remainder-man having sold property to a purchaser, by whom money is advanced to pay off a heavy and pressing incumbrance, the remainder-man representing himself to have a right to sell with the concurrence of the tenant for life for that purpose: whereupon a draft of conveyance is prepared, to which the tenants for life and remainder-men are made parties, and the purchaser takes possession; gives such an equitable title to the purchaser, as having cleared the estate from a charge to which the tenant for life was liable, as to establish a lien on the property, which equity will protect by enjoining the tenant for life from proceeding by ejectment to obtain possession until the cause shall be finally determined on the hearing, whatever case may be made by the

the answer on merits stated on the part of the Defendant in equity.
Ludlow v. Grayall 8

Vide INTEREST.

LIMITATIONS

(Statutes of.)

The commencement of a suit by information by the Attorney-General on the part of the Crown for the recovery of forfeitures under a penal act of parliament, must (with reference to the statute of limitations) be taken to be the issuing of process, and not the actual filing of the information.

Attorney-General v. Hall 760

MALICE

MALICE

(In holding to Bail.)

(Where implied.)

In an action on the case for maliciously holding the Plaintiff to bail, which was founded on the single fact of her having been arrested on mesne process at the suit of the Defendant for money due from her as administratrix of her husband to the Defendant as indorsee of two promissory notes made by the husband, no proof having been offered on the trial of malice express or implied, the jury gave a verdict for the Plaintiff with 5s. damages.

On motion to set aside the verdict and enter a nonsuit on the as-

sumed defect in the Plaintiff's case of the absence of evidence of malice, the Court were inclined to hold that such a case of implied malice had been made out as would support the verdict against that objection. The damages being very small however, they held it to be a case in which they ought not to interfere, and refused a rule to shew cause.

Fletcher v. Webb - 381

MEMORANDA.

Vide pp. 42. 109. 413.

MODUS

Vide EVIDENCE.

ISSUE.

COSTS.

MORTGAGE

Vide INJUNCTION, No 4.

MOTION

(Where not proper.)

Vide INJUNCTION, No 5.

PRACTICE (at Law.)

PRACTICE (in Equity.)

N.

NON DECIMANDO

(Defence of.)

Vide EVIDENCE, No 10.

NONSUIT

(Where properly directed.)

Vide FALSE RETURN.

(Where set aside.)

Vide EVIDENCE, No 15.

Where a Rule for entering after verdict, refused on the ground of the small amount of the damages.

Vide MALICE.**NEW TRIAL.**

1. Where trespass is brought which involves a question of the right to land, although evidence of acts of ownership, &c. be given on both sides, if the judge who tried the cause should consider that the testimony on either side preponderates, and so direct the jury, the opposite party is not bound by the verdict, and the Court will grant a new trial.

Cooks v. Green - - - - - 736

2. New trial of ejectment granted under particular circumstances in evidence in the cause, notwithstanding the verdict of the jury (for the Defendant) was in conformity with the direction of the learned judge who tried the action. — Costs ordered to abide the event.

Doe, dem. Beanland, v. Hirst - 475

3. New trial of issue directed by the Court of Equity in the Exchequer may be moved for at any time in the following term; the rule confining the application in ordinary cases to the first four days of the succeeding term does not apply to feigned issues.

Pulley v. Hilton and Others - 380

4. Such motions should in the first

instance be made before the Lord Chief Baron alone, where the issue has been directed by him.

Pulley v. Hilton and Others - 380

5. The Court will not grant a new trial on the ground of some of the facts on which the verdict might have been found, having been brought into doubt by affidavits stating circumstances of surprise, if there be sufficient evidence to sustain the verdict, putting the surprise out of the question.

Hartwright v. Badham - 383

(Where Refused.)

Vide BANKRUPT, No 4.
EVIDENCE, No 15.

Where the damages found on a verdict for the Plaintiff in an action on the case are of small amount, the Court will not grant a rule for setting aside the verdict and entering a nonsuit.

Vide MALICE.**NOTICE**

(What sufficient.)

1. Where there is a covenant in a lease for lives to renew by adding a life or lives in the room, of any of the *census qui vie* who should die, upon notice to be given in writing, a Court of Equity in a suit for a renewal will relieve against an objection taken that notice of an intention to renew was not given, according to the letter of the condition of the covenant, in writing.

Maxwell and Others v. Ward - 316

(Of Dissolution of Partnership.)

2. **Vide PARTNERS.**

3. Notice

3. Notice must be given of an application to discharge a rule nisi.

Raby v. Olarenschaw - - - 512

4. It is not sufficient notice of the insolvency of a trader to preclude the creditor under the 49 Geo. 3. ch. 121. by bringing him within the provision of the second section from levying execution, that a letter had been sent to him by the solicitor of the trader requiring him to delay his execution lest he should so involve the debtor as to render him unable immediately to satisfy his engagements, and proposing to pay the debt by instalments as the only means of enabling the creditor to realize the whole amount of his demand.

Abraham and another v. George and another - - - - - 423

(Want of Notice)

Effect of.

5. Judgment in ejectment against the casual ejector set aside on the ground that no notice of the proceedings had been given to the landlord by the tenant in possession on terms.

Doe, dem. Ingram, v. Roe - - 507

(Of Renewal of Lives in Lease,)

Vide COVENANT (Construction of,)

NULLA BONA

Where a good Return,

Vide FALSE RETURN.

G.

OBLIGATION,

Vide BOND.

OPPOSITION

(To Justification of Bail.)

In what case Costs not given.

Vide COSTS No 7.

P.

PAROL AGREEMENT

(How to be Pleaded,)

Vide PLEADING (at Law,) No 8.

PARTIES

Vide PRACTICE (in Equity,) No 12.

PARTNERS.

Suare,—Whether a partnership for an indefinite time, without deed, can be dissolved on notice by either party?

Where a Defendant in a suit, founded on charges of misconduct, for an account and a dissolution of the partnership and for an injunction to restrain him from receiving debts, drawing bills &c. or further interfering in the partnership concern,

cern, denied or explained facts of appropriation to his own use of debts received by him from persons indebted to the concern, and alleged that he could not put in his answer to the bill because the Plaintiff had possessed himself of the partnership books, and carried them away from the partnership premises, the Court would not even grant the injunction, on the ground of the Plaintiff having acted improperly.

In refusing such an application, however, the Court did so expressly without prejudice to any future application.

Littlewood v. Caldwell - - - 97

PAYING MONEY INTO COURT,

(Where necessary,)

Vide INJUNCTION, N° 2.

PERFORMANCE

(Of Covenant,)

Vide COVENANT, BILL FOR (Construction of.)

PETITION,

(To the Crown,)

By a Convict to be heard on supposed ground for Pardon,

Vide EVIDENCE, N° 19.

(To Court in Matter of Equity,)

Vide PRACTICE (in Equity,) N° 16.

PLEA.

Vide PLEADING (at Law,) *passim*.

PLEADING (in Equity,) *passim*.

PLEADING

(At Law.)

1. It is not necessary in a declaration against a person, on his undertaking to be answerable for, or to pay the debt of another, to state an agreement or memorandum, or the terms of any such, or the parties thereto, or that it was in writing or signed by the Defendant; nor is it necessary to do so in the replication to a plea averring that no agreement nor note nor memorandum, stating the consideration to be in writing signed by the Defendant, was stated or shewn.

Such a plea held bad on special demurrer, notwithstanding the decision in the case of *Saunders v. Wakefield*, 4 Barn. and Ald. 595.

Lilly and others (Assignees of Bankrupts) v. Hewit - - - 494

2. It is not matter of objection to a declaration for that cause of action, that the consideration for such collateral undertaking as set out in the count, is inadequate; for it is not necessary to state a full and adequate consideration to maintain assumpsit on the promise and undertaking of the Defendant to pay the debt of another. A good and valuable consideration in law, is all that it is necessary to state for that purpose.

Therefore if the undertaking were to be answerable for and to repay money advanced to a limited amount to a third person, it cannot be objected that the money already advanced, was an insufficient consideration to ground the undertaking.

Ib.

3. It

3. It is not necessary in a declaration on a promise to pay the debt of a third person to aver a request made to the party himself in the first instance, to pay the debt before the guarantee was resorted to; at least an averment that the former had neglected and refused to pay the money, is sufficient for the purpose of maintaining the action against the latter.

Lilly and others (Assignees of Bankrupts) v. Hewitt - - - 494

4. A count on the 42 Geo. III. c. 38. s. 12., stating that the Defendant between the 21st day of October, 1819, and on each and every of divers, to wit, twenty other days, between that day and the day of exhibiting the information, did mix a large quantity, to wit, twelve gallons of strong beer, with a large quantity, to wit, twelve gallons of table beer, in each and every of divers, to wit, five other casks, whereby, &c. the Defendant had for each of the said offences forfeited the sum of 200*l.*, amounting in the whole to 21,000*l.*, held to be a good count against the objections that it was cumulative and multifarious, being a single count for many penalties,—that the divers other days on which, &c., ought to have been specified and stated,—that the charge was uncertain and unintelligible, or repugnant,—and that from the calculation of the amount of the sums alleged to be forfeited, it appeared that the Defendant was charged with five offences on each day, whereas he could not in point of law be considered to have committed more than one offence on each particular day.

Attorney General v. Freer - - 183

5. In penal informations filed in this Court by the Attorney-General, ancient precedents are considered good authority for the form of particular counts.

Ib.

6. An action on the case for a personal injury, in consequence of the negligent, careless, and improper driving of the horse and chaise of the Defendant against the Plaintiff, held to have been proper in form; although the evidence proved that the act was violent, and the injury which resulted, immediate. *Graham, Baron, dissente.*

Lloyd v. Needham - - - 606

(*Scire facias* on bond.)

Demurrer to Rejoinders.

7. To *scire facias* against a surety on bond to the Crown, reciting that the principal was at the time, &c. a Clerk in the Ordnance Office, by means whereof he had been and would be entrusted with money, condition that the principal should from time to time during to long time as he should continue to hold the said place which he then held, or any other place in the said office, pay the money received by him as Clerk as aforesaid, and should do as well during the term of his holding the said office as afterwards, well and truly account for and deliver up to the Treasurer of the Ordnance Office all such money, &c. as should come to his hands or be committed to his care as Clerk in the said Office—the Defendant pleaded that the principal did, &c. [in the words of the condition] REPLICATIONS (in substance) that the principal was at the time, &c. a Clerk, to wit, second Clerk in the Ordnance Office, and continued in the office of such Clerk for the space of four years and until afterwards, to wit on the 31st January, 1816, the principal became, and was chief or first Clerk in the said office, and so continued till the several defaults, &c.; and that whilst he continued chief or first Clerk he received money which he did not pay over to the Treasurer of the Ordnance:

Ordinance: *Secondly*, that on the 6th of *January*, 1818, the principal gave to the Treasurer of the Ordinance an account of the monies received by him as such clerk, and of the balance of cash then in his hands on such account, and that he (the principal) ought to have paid and delivered up such balance to the Treasurer, but did not; *Thirdly*, that the principal after the making the said bond, and whilst he so continued Clerk as aforesaid, received money belonging to his Majesty in his said Office of Ordinance, a great part of which he, as such Clerk, ought to have paid on the 6th of *January*, 1818, to the said Treasurer, but did not: *Fourthly*, that after, &c. to wit, on the said 6th of *January*, the principal gave in an account of money received and paid by him (the principal,) as being a Clerk in the said office, and of the balance of cash then in his hands, on such account which, although it was the duty of the principal as such Clerk as aforesaid, to pay over, &c. he did not, &c. contrary to his duty as a clerk in the said office. REJOINDER—as to the first breach assigned in the replication—that at the time &c. the principal was a clerk in the said office, viz. second clerk, and that he continued therein till he became first clerk, in manner and form, &c. and that he was and continued first clerk until the twenty-sixth of *February*, 1810, when he was dismissed from his said place or office without the knowledge of the Defendant, and without notice to him: and that as to part of the money alleged to have been received by the principal whilst he so continued such first clerk, viz. one hundred pounds, the same was received by him whilst he was and continued such first clerk, and in the capacity of and as such first clerk as aforesaid, but that the residue was received by

him not in the capacity of and as such clerk as aforesaid, but by virtue of and under another, and different office, which he then and there held whilst he continued such clerk as aforesaid, and that the said part thereof (the hundred pounds) had been duly applied accordingly, &c.: *Secondly*, that at the time, &c. the principal was a clerk in the said office, and so continued till, (&c.)—the like allegation as in the first rejoinder to the bracket, stating the dismissal to have been on the second of *March*, in the same year, and averring that the principal had duly accounted for and paid all such money as he had received in his capacity of and as such clerk as aforesaid accordingly, &c. The third and fourth rejoinders were nearly *mutatis mutandis* in the same terms. The SUBREJOINDERS took issue on the averments in the first rejoinder, and demurred to the second, third, and fourth rejoinders, for insufficiency, uncertainty, and duplicity. DEMURRER allowed—these rejoinders, not being sufficient to maintain the plea.

The King v. Forman . . . 350

8. It is not an objection to a declaration, in an action of assumpsit for not giving the Plaintiff possession of certain apartments in the Defendant's house, agreed to be let by him to the Plaintiff, in consideration of rent, by a written agreement, in which the fixtures in the rooms were specifically enumerated, that it does not state the agreement to have been, as it was in fact, an agreement for letting the apartments and fixtures. Held, that the omission of the fixtures in declaring in assumpsit on the agreement, was clearly no variance.

Ward v. Smith . . . 19

9. It is now not necessary, in declaring on parol agreements, to set out the whole of the agreement, as formerly

merly it was; it is sufficient to set out so much of it as is necessary to shew the gravamen of the complaint—the part to which the particular breach applies.

Ward v. Smith - - - - - 19

10. In declarations in actions for libel, unnecessary averments should not be introduced, and regard should be had in drawing such declarations to the libel itself which is now admissible as proof of all that is positively averred therein; so as to dispense with evidence of the truth of such averments.

Jones v. Stevens - - - - - 235

11. Pleas (by way of justification to declarations in actions for libel) aspersing generally the character of the Plaintiff by averments without stating particular acts of bad conduct apposite to the justification of the Defendants, are not only demurrable to, but ought to be demurred to as due to the Court and to the judge before whom the action may be tried.

Ib.

12. It is an erroneous notion that by demurring in actions for libel to a plea by way of justification, the Plaintiff admits of necessity the truth of the slanderous matter of the libel. That only is admitted which is well pleaded.

Ib.

13. It is not a ground of demurrer to a declaration in an action on the case, by a man and his wife against a surgeon for an injury to the wife by reason of the Defendant's improper and unskilful treatment, that it is not stated in the averment that the Defendant was retained and employed as a surgeon for reward to be to him paid, by whom he was so retained or by whom he was to be paid.

Pippin and Wife v. Sheppard - 400

14. Nor is it ground of demurrer to

such a declaration that it is not stated that the Defendant undertook, &c. properly and skilfully to conduct himself in and about, &c.

Pippin and Wife v. Sheppard - 400

15. It is sufficient to aver that the Defendant was retained as a surgeon and entered upon the cure.

Ib.

16. It is not matter of demurrer that there is no venue formally laid in the declaration, if there be a place sufficiently stated in the count.

Ib.

17. To a plea in an action on a judgment recovered, that the Plaintiff sued out a *capias ad satisfaciendum* against the Defendant, under and by virtue of which said writ the sheriff took and arrested the Defendant and had him in custody for the debt and damages; replication protesting the suing out and delivering the writ to the sheriff, and traversing that under, and by virtue, &c. the sheriff took the Defendant is sufficient, such an allegation being traversable, as being matter of law connected with matter of fact.

Savile v. Jackson - - - - - 343

18. *Vide EVIDENCE, No 3.*

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PLEADING

(*In Equity.*)

[*Plea*]

Where overruled and ordered to stand for answer.

1. To part of a bill praying an account of the great tithes arising out of certain lands called the *Old Inclosures*, in the occupation of the Defendants, a PLEA setting forth an inclosure

inclosure act and an award of commissioners under it, wherein they had allotted certain parts of the inclosed lands in lieu of the right to tithes in kind in various persons and *in lieu of and as a compensation for all tithes due to the Plaintiff* (after having noticed a dispute between a claimant of the tithes of certain *Old Inclosures* as against the Plaintiff, which they had declined to determine), and averring that the lands in the occupation of the Defendants *were not part of the Old Inclosures* so in dispute—overruled, and ordered to stand for an answer, with liberty to Plaintiff to except—not being a short answer to the bill, bringing the question between the parties to a single point, precisely meeting the allegations in the bill.

Wing v. Murrells and Others - 723

2. Where Defendants in a tithe cause claim exemption from payment for particular lands, such lands must be very accurately set out and described in the answer, and their local situation and boundaries must be distinctly defined.

Markham v. Smyth, Bart. and Others
126

POSTPONING TRIAL,

Vide AFFIDAVIT, No 4.

PRACTICE,

(At Law.)

1. It is now a rule in this Court, that in all orders to shew cause why awards should not be set aside, the short grounds on which they are applied for and obtained shall be stated therein.

Smith v. Briscoe - 37

2. On a demurrer standing in the paper being called on for argument, if the party who appears to support the demurrer have not delivered the paper books to the junior baron the Court will give judgment against him.

The King v. Forman - - - 161

3. The Court will not set aside the service of a writ for irregularity, in being served in a city locally within a county where it was directed to the sheriff of that county, if the Defendant have paid the debt and part of the costs; for such an irregularity may be waived by the conduct of the Defendant.

A rule to shew cause under such circumstances discharged *with costs*.

Monday v. Sear - - - 122

An application for such a purpose must be made in the first instance.

Id.

It is not necessary in this Court that the affidavit on which such an application is founded should negative that the process was served on the confines, and that there existed any dispute about the boundaries.

Id.

4. The rule of practice;—that a party against whom a verdict at law has been obtained must pay the sum recovered into Court before he can entitle himself to an injunction to stay execution,—prevails, notwithstanding a rule have since been obtained by him requiring the Plaintiff to shew cause why there should not be a new trial.

Austen v. Thomson - - - 1

(Notice of Motion.)

5. It is necessary to give the opposite party notice of an application intended to be made to discharge a *Rule Nisi* for an order of the Court. That species of Rule is in practice peculiar to this Court, and in this

3 1 2 respect

respect differs materially from the ordinary rule to shew cause.

Raby v. Clarendshaw - - - 512

6. The evening attendance of a barron at chambers during term discontinued for the future, and in future attendance to be given at chambers at half an hour after three o'clock in the afternoon of every day in term time.

Regula Generalis - - - 422

(*Respecting Proceedings against Insolvent Debtors.*)

7. To prevent unnecessary expense to Plaintiffs suing in this Court, in case of notice given by prisoners of their intention to apply for their discharge under any act made for the relief of Insolvent Debtors, It is ORDERED, that after such notice given to any Plaintiff, no prisoner shall be superseded or discharged out of custody at the suit of such Plaintiff, by reason of such Plaintiffs' forbearing to proceed against him according to the rules and practice of this Court, from the time of such notice given, until some rule or order shall be made in the cause in that behalf by this Court or one of the judges thereof. And it is further ordered, that a copy of this rule shall be hung up in the Fleet Prison, in the place where rules of this Court are usually hung.

Ib.

(*Sufficiency of Documents.*)

8. The warden's certificate of a prisoner being in his custody for contempt for non-payment of costs taxed, is sufficient to found a motion for a sequestration, without any affidavit of demand and refusal to pay.

Phillips and Another v. Stephenson 473

Mantell v. Marchant - - - 474

Jenkins v. Davies - - - *Ib.*

(*Venue.*)

9. The Court will not change the venue from the county of Gloucester to the city of Bristol, in Hilary Term, on the usual affidavit, although the Defendant swear to merits, and offer to pay into Court the debt, and a sum of money to cover costs.

A rule obtained on such an application discharged with costs.

Broadrick v. Clarke and Others 743

(*Rule of Court.*)

10. It is now a rule in this Court that, in all orders to shew cause why awards should not be set aside, the short grounds on which they are applied for and obtained, shall be stated therein.

Smith v. Briscoe - - - 57

11. Rule for staying proceedings on an assignment of a bail bond, which had been obtained upon the application of one of the bail, stating by affidavit an engagement between himself and the Plaintiff to relieve him from his obligation, on payment of a sum of money at a future day, on the ground of a breach of good faith in proceeding against him before the time, notwithstanding the agreement discharged with costs, upon a distinct denial (by affidavit) of the making the agreement as stated.

Sweeting v. Weaver - - - 734

12. Order for a concilium granted on the 21st of June for arguing on the 26th (the last day of term) a demurrer, delivered by the Defendant to the Plaintiff's replication on the 18th of June, the demurrer book being delivered on the 20th, but no rule given to bring in the demurrer book: the Court refused to set aside the order where it appeared that the demurrer was filed for delay, the Plaintiff having tendered an issue to the country

on the Defendant's pleas, although four days had not been given to the Defendant to return the demurrer.

Saule v. Jackson - - - - 337

13. A rule that former attorneys deliver in their bill of costs to the new attorneys of a party under an order of Court, is a rule to shew cause, and not absolute in the first instance.

Gripper v. Cole - - - - 593

Vide NEW TRIAL.

COSTS.

JURISDICTION.

PRACTICE

(*In Equity.*)

(*Time to answer where refused.*)

1. The Court will not grant a Defendant, in a suit for tithes, who has filed a cross bill against the Plaintiff for a discovery, time to answer the original bill, until after an answer shall have been put in to the cross bill.

The court is to amend the answer, if it should be found necessary.

Dolton v. Whittington - - - 28

2. A Defendant to a bill of revivor cannot put new matter on the record, which might, if stated in the answer to the original bill, have produced a different decree. If he do, it will be impertinent, and may be expunged.

Namby and Others v. Totty, Clerk 117

3. If the bill be not properly a bill of revivor, or if the Plaintiff be not a party entitled to file a bill of revivor, the Defendant should demur, as by answering he waives the objections, and admits the bill to be a good bill of revivor, and that it may be well filed by the party.

Id.

4. Exceptions to the Master's certificate, on reference of an answer for impertinence, may not be filed as of course in this Court.

A previous application must be made to the Court for leave to file exceptions.

Thornton v. Pellatt - - - - 733

Exceptions.

Where waiver of Motion for Production of Papers.

5. Where the effect of a motion would be to waive exceptions to answer, the Court will not qualify their order by making it without prejudice to exceptions being taken.

Quare,—Whether a motion for production of papers, &c. operates as a waiver of the Plaintiff's right to exceptions?

Phillips v. Stephenson - - - 733

6. A Plaintiff in a tithe cause, lessee of a vicar, ordered on motion to bring in and deliver to his clerk in Court, books, papers, &c., stated in affidavits to be in his possession, and to belong to the vicar, who was not a party to the suit.

Forman and Another, Assignees, &c. v. Cooper - - - - 515

7. A cause standing in the paper of the day, and being about to come on to be heard at the sittings, the Court nevertheless granted a motion for transferring it to a future day in the following term, and that a cross cause should be advanced in the paper, to be heard at the same time.

But they imposed on the party applying the terms of paying the costs of the day.

Roberts v. West - - - - 514

8. Cases of moduses found differing from those laid in the answer, and directed to be tried by the issue ordered, but received and acted upon

upon by the Court, disapproved,
and for what reasons.

Williamson v. Thompson - - - 745

----- *v. Lord Londale* - *Ib.*

----- *v. Hutton* - - - *Ib.*

Lowe v. Firkins - - - - - 453

9. The rule of practice,—that a party against whom a verdict has been obtained must pay the sum recovered into Court, before he can entitle himself to an injunction to stay execution—prevails notwithstanding a rule have since been obtained by him requiring the Plaintiff to shew cause why there should not be a new trial.

Austen v. Thomson - - - - - 1

10. On motion to dissolve an injunction the Plaintiff cannot use any allegation in the bill in support of the injunction, unless the fact be confessed in the Defendant's answer.

Maxwell and Others v. Ward - 14

11. In an interpleading suit one of several Defendants' answers may be read against the others.

Bowyer v. Pritchard and Others 103

12. A material amendment,—the addition of necessary parties—is not sufficient cause for discharging an order nisi to dismiss a Plaintiff's bill for want of prosecution.

Craft v. Appleton - - - - - 382

13. The proper course for saving the bill is to reply, and thereupon an order for leave to withdraw and amend.

Ib.

14. The facts on which the application for such an order is founded must be verified by affidavit.

Ib.

15. When the Defendant in a tithe cause submits to part of the Plaintiff's demand the Court will, on motion for that purpose on the part of the Defendant, refer it to

the Master in any stage of the proceedings to ascertain what is due and tax the costs, the Defendant undertaking to pay the amount found by the report to be due, without prejudice to any other question in the cause.

Lowe v. Firkins - - - - - 453

16. An arrangement agreed on by all parties for the purpose of ending a cause should be made the subject matter of petition to the Court, as it cannot be effected and perfected by the sanction of the Court upon a summary motion.

Gribble v. Carpenter - - - 509

17. *Vide* AMENDMENT.

ARREST (of Judgment).
INJUNCTION.

PRACTICE

(*In Revenue matters.*)

Mode of procuring the discharge of a crown debt (arrears of taxes), and obtaining release from process where the debt is paid by the crown debtor upon motion by the Attorney-General.

Ex parte Bennett in Re Rex v. Bennett 770

Vide EXTENT.

JURISDICTION (of Court of Exchequer).
RECOGNIZANCE.

PREROGATIVE PROCESS,

Vide EXTENT.

PRINCIPAL AND SURETY,

Vide PLEADING (*at Law.*)

PRIORITY.

(In satisfying Crown Debts.)

Vide FALSE RETURN, N^o 1.

(Of Execution.)

Vide FALSE RETURN, N^o 2.

PRISONER.

Vide ARREST.

BAIL, N^o 3.

CERTIFICATE.

COSTS, N^o 7.

PRACTICE AT LAW.

PRIVILEGED KNOWLEDGE,

(What is not.)

Vide EVIDENCE, N^{os} 10, 11, 12.

PROCESS,

Vide AFFIDAVIT.

BAIL.

EXTENT.

LIMITATIONS.

PRACTICE *(in Revenue.)*

RECOGNIZANCE.

PRODUCTION OF PAPERS.

(Motion for)

Vide PRACTICE *(in Equity,)* N^{os} 5, 6.

PROMOTIONS.

Vide MEMORANDA.

PROOF,

Vide EVIDENCE.

PUBLICATION

(Of Depositions)

Enlarging.

Vide AFFIDAVIT, N^o 6.

(Of Proceedings pending Trial of Prisoner after prohibition.)

Vide FINE AND IMPRISONMENT.

Q.

QUERIES.

Vide BOND *(to the Crown.)*

EVIDENCE, N^o 12.

INJUNCTION.

PLEADING *(at Law,)* *passim.*

PRACTICE *(in Equity,)* N^o 5.)

R.

RECOGNIZANCE

(Where discharged on Petition.)

1. Estreat of forfeited recognizance discharged on petition under the 4 Geo. 3. ch. 10.

Operation and construction of that statute with reference to its object, and the nature of the particular case, and the circumstances of the applicant, and what he had already endured in consequence of the forfeiture of his recognizance.—*Vide* PRICE'S "TREATISE ON THE COURT OF EXCHEQUER," Vol. I. B. I. Ch.

XIII.

In Re manuscriptors of Cartman—in Rex v. Cartman 637

(Where discharge refused.)

Respite of, de termino in terminum.)

2. Under circumstances, the Court refused not only to discharge the recognizances of three persons bound for the appearance of one of them, the principal, at the quarter sessions, to answer a charge of misdemeanor, but even to respite it generally till further order.

They also refused to respite process for a longer time than till the following term, considering it a case for suspending process from term to term only.

In Re Recognizance of Clarke and Others - - - - - 730

REFERENCE

(To Master.)

Vide PRACTICE (in Equity), No 15.

REGULÆ

(Generales.)

*Vide ATTENDANCE AT CHAMBERS.
EXTENT, No 10.*

REJOINDER.

Vide PLEADING (at Law).

RELANDING

(Goods Bonded for Exportation.)

What is.

Vide BOND (to the Crown).

RENDER

(By Bail.)

*Vide AFFIDAVIT No 7.
BAIL, No 2.*

RENEWAL

(Of Lease.)

*Vide COVENANT.
NOTICE.*

REPLICATION

Vide PLEADING (at Law).

REPORT

(Of Master,)

Effect of.

Vide APPROPRIATION.

REPUTATION

(Evidence of.)

Where admissible in proof to establish a custom; and to what persons as witnesses the objection of incompetency does not attach.

Vide EVIDENCE, No 2.

RESIGNATIONS.

Vide MEMORANDA.

RESPITE

(Of Process.)

Vide RECOGNIZANCE.

REVENUE,

Vide APPROPRIATION.
BOND (to the Crown.)
CONSTRUCTION (of Statutes.)
EXTENT.
JURISDICTION (of House of
Lords.)
RECOGNIZANCE.

RULES

(Of Court.)

Vide ATTENDANCE (at Chambers).
EXTENT, N^o 10.
PRACTICE (at Law), N^{os} 1, 7,
10.

S.

SEQUESTRATION.

Vide CERTIFICATE (of Warden).

SERVICE

(Of Process.)

Irregularity in.

Vide AFFIDAVIT, N^o 1.
COSTS, N^o 2.
LACHES.

SETTING ASIDE PROCEEDINGS.

Where ordered.

Vide BAIL, N^o 2.
COSTS, N^o 6.

Where Refused.

Vide COSTS N^o 2.

SHERIFF.

Vide BANKRUPT.
FALSE RETURN.
INTEREST.

SPECIAL DAMAGE.

Vide EVIDENCE, N^o 15.

STATUTES

[Adverted to, &c. in this volume]

(Public.)

Edward III.

31. - - - - -
Giving Writ of Error from
Exchequer.

Richard II.

5. s. 1. c. 10 - - - - -
Giving the Court of Exche-
quer authority to hear every
answer of every demand in
Court.

Henry VIII.

1. c. 8. - - - - -
Preventing Escheators and Com-
missioners returning inqui-
sitions or commissions un-
der jury.

33. c. 39. - - - - -
Statute of Equity in the Ex-
chequer.

Discharge of Recognizance
under.

33. c. 39. - - - - -
Authorizing filing bill by s

ject against the *Attorney-General*.

Elizabeth.

13. c. 4. - - - - -	679
Authorizing sale of lands of certain crown debtors for payment of their debts to the king.	
13. c. 4. - - - - -	721
27. c. 3. - - - - -	721
Explaining the 37 Eliz. c. 4.	
31. c. 5. s. 5. - - - - -	761
Statute of Limitations of actions, &c. upon penal statutes.	

Charles II.

29. c. 7. s. 6. - - - - -	124
For the better observation of the Sabbath.	
Service of process on the Lord's day void.	

William III.

10 and 11. c. 21. s. 14. - - -	217
Duties of Excise.	
Distillers (of acids).	

Anne.

2 and 3. c. 4. - - - - -	489
Register Act.	
9. c. 11. s. 17. - - - - -	224
Excise duties and regulations.	
Tanners—to assist officers of excise in weighing, &c., in execution of their duty.	

George III.

1 and 2. c. 118. - - - - -	302
For the more effectual administration of the Police of the Metropolis.	
4. c. 10. - - - - -	637
For the more easy discharge of Recognizances of poor persons.	

4. c. 10. - - - - -	638
5. c. 43. s. 22. - - - - -	222
Excise duties.	
Regulations respecting tanners.	
20. c. 28. - - - - -	550
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Legacy duty.	
21. c. 55. - - - - -	305
Importation duties on spirits, &c.	
Regulations respecting.	
22. c. 58. - - - - -	550
Stamp duties.	
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24. c. 41. s. 1. - - - - -	217
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25. c. 35. - - - - -	643
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25. c. 35. - - - - -	679
<i>Ib.</i> - - - - -	689
25. c. 35. s. 1. - - - - -	661
Costs of sale of crown debtor's lands.	
26. c. 73. - - - - -	284
Duties of excise.	
Discontinuing payment of on low wines, &c. for home consumption.	
29. c. 51. - - - - -	550
Legacy duty.	
36. c. 52. - - - - -	550
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36. c. 52. - - - - -	571
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37. c. 90. - - - - -	248
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39 and 40. c. 67. - - - - -	284
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41. c. 103. - - - - -	302
For giving locality in Europe to the island of Malta.	
42. c. 38. s. 12. - - - - -	183
Excise duties.	
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43. c. 81. - - - - -	307
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45. c. 69. - - - - -	322
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44. c. 28. - - - - -	552
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45. c. 121. - - - - -	347
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45. c. 28. - - - - -	552
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48. c. 49. - - - - -	552
Legacy duties.	
49. c. 8. - - - - -	313
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49. c. 121. - - - - -	424
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52. c. 24. - - - - -	530
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54. c. 149. - - - - -	309
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55. c. 83. - - - - -	314
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Duties on spirits.	
55. c. 184. - - - - -	547
Duties on testamentary bequests.	
55. c. 184. schedule, part 3 -	32
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57. c. 117. - - - - -	598
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57. c. 117. - - - - -	30
58. c. 65. s. 6. - - - - -	217
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Distillers and vinegar makers.	
58. c. 76. - - - - -	347
Customs.	
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George IV.

1. c. 77. - - - - -	312
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Excise duties.

Spirits.

8. c. 81. s. 7. - - - - -	429
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(Private.)

George III.

47. c. 92. - - - - -	723
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Inclosure Act.

Vide CONSTRUCTION OF STATUTES.

STAYING PROCEEDINGS.

(Where ordered.)

Vide BAIL.

COSTS, N^o 5.

STEWARD.

Vide EVIDENCE, N^o 10, 11, 12.

SUPERSEDEAS.

Vide PRACTICE (at Law), N^o 7.

SUBPŒNA,

(Duces tecum.)

Vide EVIDENCE, N^o 9.

SURPRISE.

Vide NEW TRIAL.

SURREJOINDER.

Vide PLEADING (at Law).

T.

TANNERS.

Vide CONSTRUCTION OF STATUTES.

TAR DISTILLERS.

Vide CONSTRUCTION OF STATUTES.

TAXES,

(Discharge from arrears of.)

Vide PRACTICE *(in matters of revenue).*

TERMS

(Of granting orders.)

Vide BAIL.
COSTS.
INJUNCTION.

TIME.

(Where given.)

Vide BAIL, N^o 1.
EXTENT, N^o 8.

TITHES.

Vide COSTS, N^{os} 3, 9, 10, 13.
EVIDENCE *(passim)*.
INJUNCTION, N^o 7.
ISSUE.
LEASE.
PLEADING *(in Equity)*, *(passim)*.

TRADER.

Vide BANKRUPT.

TRAVERSE.

Vide PLEADING *(at Law)*, N^o 17.

TRESPASS.

Vide CASE.
NEW TRIAL, N^o 1.

U.

UNDERTAKING.

Vide ASSUMPSIT.
PLEADING *(at Law)*, N^o 14.
PRACTICE *(in Equity)*, N^o 15.

UNION,

(Act of,)

Construction of.

Vide CONSTRUCTION *(of Statutes).*

V.

VARIANCE.

Vide PLEADING *(at Law)*.

VENDOR AND VENDEE.

Vide INJUNCTION, N^o 3.

VENUE.

The Court will not change the venue
from the county of Gloucester to
the city of Bristol, in Hilary term,
on

on the usual affidavit, although the Defendant swear to merits, and offer to pay into Court the debt, and a sum of money to cover costs.

A rule obtained on such an application discharged *with costs*.

Broadrick v. Clark and Others - 743

Vide PLEADING (*at Law*), N^o 16.

VERDICT,

(*Effect of.*)

Vide INJUNCTION, N^o 3.

JURY.

NEW TRIAL, N^o 4.

VINEGAR MAKERS.

Vide CONSTRUCTION (*of Statutes*).

W.

WAIVER.

Vide COSTS, N^o 2.

PRACTICE (*in Equity*), N^{os} 3. 5.

WITNESS

(*Competency of.*)

Where the prisoner was indicted for forging a power of attorney to transfer stock, to which he had affixed his own name and that of a co-trustee, in whose names the stock stood in the Bank-books, the co-trustee (who on hearing of the transaction had apprised the Bank of the matter by letter, and had thereby prevented the transfer) is admissible and competent as a witness to prove the forgery.

Rex on the prosecution of the Bank of England v. Wait - - - 318

Vide EVIDENCE (*passim*).

WORK AND LABOUR.

Vide PLEADING (*at Law*).

WRIT.

(*Of Fieri facias.*)

Vide EXECUTION.

EXTENT.

FALSE RETURN.

END OF VOL. XI.

